

1 UNI TED STATES DI STRI CT COURT  
2 EASTERN DI STRI CT OF NEW YORK  
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6 IN RE:  
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8 AIR CARGO SHI PPI NG  
9 SERVICES ANTI TRUST  
10 LITIGATION,  
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12 Uni ted States Courthouse  
13 Brooklyn, New York  
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15 Tuesday, April 29, 2008  
16 10:00 a.m.  
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19 TRANSCRI PT OF CI VIL CAUSE FOR ORAL ARGUMENT ON MOTI ON TO  
20 DISMIS  
21 BEFORE THE HONORABLE VIKTOR V. POHORELSKY  
22 UNI TED STATES MAGISTRATE JUDGE  
23

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1 (In open court.)

2 COURTROOM DEPUTY: All rise.

3 THE COURT: Good morning. Please, be seated.

4 ALL: Good morning.

5 THE COURT: I'm going to take just a moment to get  
6 acquainted on the bells and whistles here because I'm not  
7 familiar with them either. I gather some of you have become  
8 familiar.

9 (Discussion held off the record.)

10 (Pause in the proceedings.)

11 THE COURT: All right. Good morning.

12 You want to call the case, Jim?

13 COURTROOM DEPUTY: Yes, Civil Cause for Oral  
14 Argument in 06-MD-1775, In Re: Air Cargo Shipping Services  
15 Antitrust Litigation, Magistrate Judge Pohorelsky presiding.

16 THE COURT: Good morning, again.

17 As you already know, we'll be proceeding in a pretty  
18 formal fashion because of the various devices that people want  
19 to use, and the only way really to do that effectively, I  
20 think, is from the podium.

21 So, the way I envision proceeding, and who knows  
22 what will happen as this goes on, is that the movants will  
23 have the first chance to speak, the movants' representative,  
24 and then the opposition, and then some rebuttal. There may be  
25 surrebuttal, we may go back and forth a few times, as I think

1 of more questions to ask.

2 But I would like to start by having whoever speaks  
3 first with respect to a given issue, start with their  
4 presentation, let me know what they've prepared in terms of  
5 visual aids that they want me to be aware of and that they may  
6 use in their arguments, so that I'll be aware.

7 I'd like you to be able to present the argument in  
8 the way that you envisioned, as much as possible  
9 understanding, of course, that I'm going to be interrupting  
10 you with questions as we go along.

11 So, are there any questions or suggestions about how  
12 we should proceed? Other than what I've articulated so far?

13 (No response.)

14 THE COURT: All right. Thank you for preparing, or  
15 letting me know who's going to be carrying the ball on these  
16 issues. So, I might as well start with the first one.

17 I guess it's Mr. Schwartz, carrying the ball for the  
18 defendants?

19 MR. SCHWARTZ: Yes, Your Honor.

20 THE COURT: Okay.

21 (Pause in the proceedings.)

22 MR. SCHWARTZ: Your Honor, I do have a visual  
23 presentation. Our cover slide is up on the screen now.

24 (The above-referred to slide was published to the  
25 courtroom.)

1                   MR. SCHWARTZ: And if it might be helpful, we also  
 2 have hardcopies of the slides themselves that we're prepared  
 3 to hand up, if you'd like.

4                   THE COURT: I guess it wouldn't hurt for me to have  
 5 them. I'm not sure how much use I'll make of them, but if you  
 6 want to.

7                   MR. SCHWARTZ: Sure. And we also have copies for  
 8 plaintiffs' counsel, if they'd like some.

9                   THE COURT: Yes, please. To the extent they are  
 10 interested, they should receive copies, as well. Thank you.

11 ARGUMENT I

12 BY MR. SCHWARTZ:

13                   MR. SCHWARTZ: Thank you, Your Honor. Edward  
 14 Schwartz, DLA Piper, Counsel for Cathay Pacific Airways  
 15 Limited, and I will be addressing the FTAIA motion.

16                   Your Honor, as I believe you are aware, the  
 17 plaintiffs are alleging that they were harmed by allegedly  
 18 paying overcharges as a result of a global conspiracy to fix  
 19 the prices for air cargo services. And plaintiffs, of course,  
 20 bear the burden of properly alleging subject matter  
 21 jurisdiction as to each of those claims. But that they have  
 22 clearly failed to do so with respect to those claims  
 23 predicated upon purchases of air cargo services for shipments  
 24 originating in a foreign country, regardless of the  
 25 destination to which the goods were ultimately shipped.

1                   THE COURT: Okay. Here's the first question I do  
2 have because I want to get a -- you used the phrase "foreign  
3 purchases," I think, in your brief. And I think you concede  
4 that domestic purchases of air cargo services, there is  
5 subject matter jurisdiction for those.

6                   MR. SCHWARTZ: That is correct, Your Honor.

7                   THE COURT: So, how do you specifically define  
8 foreign purchases, and distinguish those from domestic  
9 purchases?

10                  And just to sharpen this a little bit, what about an  
11 American or domestic United States purchaser of services who  
12 actually purchases the services here for transport of goods  
13 from abroad to the United States as opposed to that purchaser  
14 going, again, a domestic purchaser going to a foreign market,  
15 if you want to call it that, and purchasing the same services?

16                  And is there any legitimate way to draw a line  
17 between those two?

18                  MR. SCHWARTZ: Well, there is, Your Honor.

19                  First, the plaintiffs have divided their claims by  
20 location of purchaser. Counts 1 and 2 are brought on behalf  
21 of purchasers located within the United States. Counts 3  
22 through 7 are brought by foreign purchasers.

23                  THE COURT: No, I understand that distinction.

24                  But the location of the purchaser is one thing. The  
25 location of the purchase is another.

1 MR. SCHWARTZ: And that exactly correct, Your Honor.

2 THE COURT: Okay.

3 MR. SCHWARTZ: And that is a fundamental element of  
4 our analysis and argument.

5 A domestic purchaser would, of course, be in Count 1  
6 if it's a direct purchaser, Count 2, if it's an indirect  
7 purchaser.

8 If a purchaser physically located in the U.S.  
9 reaches into foreign commerce, and reaches agreement with a  
10 carrier for a shipment originating from a foreign country, for  
11 purposes of the FTAA, and in particular for purposes of the  
12 threshold import commerce exception, within that threshold  
13 language of the FTAA, that would be treated as a foreign, not  
14 a domestic purchase.

15 THE COURT: Because I mean, again, are you talking  
16 about a domestic purchaser who calls Berlin and, you know,  
17 asks some freight forwarder in Berlin or somebody, a  
18 manufacturer in Berlin, to ship goods to him, to the  
19 United States, or let's say take -- that's not exactly right.

20 Contracts directly with the carrier --

21 MR. SCHWARTZ: Right.

22 THE COURT: -- in Berlin. That's the one I'm really  
23 thinking of. Calls Lufthansa in Berlin and says, I want to  
24 ship BMW parts to the United States.

25 Is that one of the purchases that is barred by the

1 FTAIA, or that there's no subject matter jurisdiction?

2 MR. SCHWARTZ: Yes. Let me say preliminarily, that  
3 to the extent, if any, that such transactions exist, they are  
4 atypical. And the plaintiffs and defendants are in agreement  
5 on this.

6 The plaintiffs concede, at pages 14 and 15 of their  
7 opposition, that the way those transactions are typically done  
8 is that it would be a freight forwarder.

9 Let's say hypothetically, we're talking about a  
10 shipment of wine from Spain, somewhere in the world.  
11 Typically, indeed the vast majority, at a minimum, of those  
12 transactions will be entered into between a freight forwarder  
13 and the carrier in Spain. Why? Because it is the local  
14 freight forwarders that have the relationships with the  
15 carriers.

16 Now --

17 THE COURT: Okay. But then, what about if the same  
18 United States purchaser contacts Lufthansa here and says, can  
19 you get these goods shipped here? Again, maybe that's the  
20 atypical case.

21 I mean, your argument is that that's a -- is that a  
22 pretty small universe of transactions?

23 MR. SCHWARTZ: It may not ever happen, but let's  
24 assume for the purposes of your question it does happen.

25 THE COURT: Yes.

1                   MR. SCHWARTZ: That specific hypothetical was  
2 addressed directly by the Second Circuit in its decision in  
3 Kruman. Charlotte Kruman, named plaintiff, a resident of  
4 New Jersey, traveled up to New York to visit with Christie's  
5 in New York.

6                   In fact, can we please go to the slide reflecting  
7 the Kruman transaction.

8                   (The above-referred to slide was published to the  
9 courtroom.)

10                  MR. SCHWARTZ: Your Honor, we're showing you now a  
11 slide -- and this is slide number three -- that graphically  
12 demonstrates the Charlotte Kruman transaction.

13                  Resident of New Jersey, Charlotte Kruman, travels to  
14 New York, visits with Christie's in New York, sees a  
15 photograph of a watch that she thought she might want to buy.  
16 This watch happened to be one being sold at auction in London.

17                  Next slide, please.

18                  (The above-referred to slide was published to the  
19 courtroom.)

20                  MR. SCHWARTZ: She made a bid. And Christie's  
21 New York transferred the bid to Christie's London. So, she  
22 dealt with Christie's New York.

23                  Next slide, please.

24                  (The above-referred to slide was published to the  
25 courtroom.)

1                   MR. SCHWARTZ: She won the auction conducted in  
2 London. Won the watch.

3                   Next slide.

4                   (The above-referred to slide was published to the  
5 courtroom.)

6                   MR. SCHWARTZ: Christie's imposed a buyer's premium  
7 pursuant to the alleged global conspiracy, fixing prices  
8 globally on auction services for buyer's premiums and seller's  
9 commissions; conspiracies between Christie's, a U.K. company,  
10 Sotheby's, a Michigan company. She dealt with Christie's.

11                  Next slide, please.

12                  (The above-referred to slide was published to the  
13 courtroom.)

14                  MR. SCHWARTZ: She paid the allegedly inflated  
15 buyer's premium to Christie's.

16                  The Court held this was not a domestic transaction,  
17 did not involve import commerce.

18                  The reason is simply, that it is a simple analysis  
19 under the threshold import commerce exception. You look at  
20 the conduct. You look at the conduct.

21                  Here, the relevant conduct was the imposition of the  
22 alleged overcharge on the buyer's premium at the auction in  
23 London. The fact that Ms. Kruman dealt with Christie's  
24 New York, even that she provided the bid to Christie's  
25 New York, was irrelevant. The case doesn't even address

1 whether Christie's New York sent her the bill or whether it  
 2 was Christie's London that issued it. It didn't matter. Even  
 3 though, even though the plaintiffs claimed in that case a  
 4 global conspiracy to fix prices everywhere in the  
 5 United States.

6 Because the fundamental analysis under the  
 7 Sherman Act divides the world in two: There is U.S. conduct  
 8 and U.S. effects, and there's foreign conduct and foreign  
 9 effects. And for purposes of the narrow threshold import  
 10 commerce exception, the Court looks only at the conduct and  
 11 sees where is the overcharge imposed. And the fact that  
 12 Ms. Kruman was in New York was irrelevant. The fact that she  
 13 dealt with Christie's New York was irrelevant.

14 And that's exactly the situation that we would have  
 15 here if we're dealing with a, say, a U.S. freight forwarder  
 16 who contacts Lufthansa overseas, or even contacts them here.

17 If the arrangement being made was for a shipment of  
 18 goods originating in Germany, the relevant conduct would be  
 19 the imposition of the alleged overcharge at the point of  
 20 origin because prices attach at the point of origin, not at  
 21 the point of destination.

22 THE COURT: Is that, that's an industry standard, so  
 23 to speak?

24 MR. SCHWARTZ: It's the way the industry works.  
 25 Pricing -- Let's talk about surcharges for a moment, which are

1 obviously, an important part of the plaintiffs' case.

2 Surcharges are applied X; X, the point of  
 3 origination. That is where the surcharges are set. But the  
 4 Court, as the Court in Kruman, doesn't even need to get into  
 5 that kind of factual inquiry, because again, the threshold of  
 6 import commerce exception is actually a simple analysis. Is  
 7 it a foreign price or is it a domestic price?

8 And it's deemed to be a foreign price if it's a  
 9 transaction originating in foreign commerce.

10 And originating doesn't mean where did the first act  
 11 occur. Originating means where was the price applied by the  
 12 defendant? Because it is the defendant's conduct and only the  
 13 defendant's conduct that is relevant in applying that narrow  
 14 threshold import commerce exception.

15 THE COURT: So, the long and short of it is that a  
 16 foreign purchase, for your purposes, the purposes of your  
 17 argument, is any purchase, transportation, services for goods  
 18 that are shipped from a point outside the United States to the  
 19 United States.

20 MR. SCHWARTZ: Yes. And those are the precise  
 21 transactions as to which we're moving under 1 and 2, domestic.  
 22 And truly, the foreign purchasers, 3 through 5. And for the  
 23 for Counts 3 through 5, foreign purchasers making purchases  
 24 for shipments originating in a foreign country with foreign  
 25 pricing, those are a no-brainer under our motion. That could

1 not be more clear. There is no argument, no reasonable  
2 argument that those shipments involve somehow domestic  
3 conduct, let alone an import market for purposes of the narrow  
4 threshold import commerce exception.

5 THE COURT: You mean, I'm sorry. You're talking  
6 about purchases of services for transportation of goods  
7 between foreign points?

8 MR. SCHWARTZ: Yes. Entirely outside the  
9 United States.

10 THE COURT: Where they're not to or from the  
11 United States, is that the distinction you're making? I'm  
12 sorry.

13 MR. SCHWARTZ: Well, the distinction, what I'm  
14 addressing now are those claims brought under Counts 3  
15 through 5 by foreign purchasers.

16 THE COURT: Right, foreign purchasers.

17 MR. SCHWARTZ: What we're saying is for those  
18 purchases by foreign purchasers, for shipments originating in  
19 a foreign country, it does not matter where the shipment goes.

20 THE COURT: Okay.

21 MR. SCHWARTZ: Because it's a foreign price that was  
22 charged.

23 THE COURT: Right.

24 MR. SCHWARTZ: If we could go -- go to slide number  
25 two, please, the overview of the FTAIA.

1 (The above-referred to slide was published to the  
2 courtroom.)

3 MR. SCHWARTZ: It might be helpful, just very  
4 briefly, to do a quick overview of the mechanics of the FTAA.

5 The first question in any FTAIA inquiry is: Does  
6 the defendant's conduct involve foreign trade or foreign  
7 commerce? No dispute with the plaintiffs there.

8                   The second question is: If it does, is it not  
9 import or import commerce? If it is import commerce out of  
10 the FTAIA, doesn't apply, still applies standing analysis, and  
11 that is a separate argument that I will be addressing.

12 If it does not, if the defendant's conduct does not  
13 involve import trade or import commerce, then you go to what  
14 is really the heart of the FTAA. That's the effects test.

15 THE COURT: But I don't see much argument from the  
16 plaintiffs on the effects test.

17 MR. SCHWARTZ: I don't think we get much, frankly.

18 THE COURT: All right. They focus their argument,  
19 at least in their opposition papers unless I overlooked  
20 something, on the import trade or commerce.

21 MR. SCHWARTZ: They take a shot at 6(a)(2), which is  
22 the only element under the effects test under which we're  
23 moving. We're not moving under 6(a)(1). Only under 6(a)(2),  
24 and that is the plaintiffs' burden to properly allege their  
25 claims arise directly from independent harm to U.S. commerce.

1 We don't think there is, frankly, a serious argument under  
 2 6(a)(2). If the plaintiffs -- the plaintiffs are putting  
 3 their acts in the import commerce basket.

4 They want to get out of the FTAIA. Why? Because  
 5 they can't satisfy the effects test. Because they can't.

6 And we believe -- and we think this is absolutely  
 7 the correct analysis -- that it cannot be the case that claims  
 8 that cannot ultimately satisfy the effects test and, in fact,  
 9 fail by a wide margin, can't be taken out of FTAIA analysis.  
 10 Congress clearly did not intend that claims that don't satisfy  
 11 the effects test, which is a codification of the ALCOA test  
 12 that predated the enactment of the FTAIA in 1982, cannot give  
 13 rise to Sherman Act jurisdiction.

14 Can we go to the next slide, please.

15 (The above-referred to slide was published to the  
 16 courtroom.)

17 MR. SCHWARTZ: This is an excerpt of the relevant  
 18 language for purposes of our motion of the FTAIA. So, this is  
 19 the threshold language that contains the import commerce  
 20 threshold test.

21 The purpose of this part of the FTAIA is simple and  
 22 narrow. It does nothing more than defines the scope of the  
 23 conduct that will be subject to the effects test in the  
 24 statute. And the import commerce exception is simply, all it  
 25 says is: If it is import commerce, it is -- if it's not

1 import commerce, we go to the effects test.

2 And there are three critical points about this test.

3 And the words drive the analysis, as the Third Circuit  
 4 properly said in Turi centro.

5 First, import trade or import commerce, for purposes  
 6 of our motion, we don't have a dispute with plaintiffs over  
 7 what that means; if bringing in of goods or maybe, maybe a  
 8 service into the United States, we're not arguing that it  
 9 doesn't apply to services. Unclear, though.

10 Second, conduct. This is critical. It is only  
 11 defendant's conduct that is analyzed in applying the import  
 12 commerce exception. It's not the effects of the conduct.

13 That's in the effects test. And as the Third Circuit  
 14 correctly said in Turi centro, if conduct involving import  
 15 commerce is interpreted broadly, it eviscerates the meaning of  
 16 the reference to import trade or import commerce in the  
 17 effects test in of 6(a)(1).

18 In other words, conduct involving import trade or  
 19 commerce cannot be the same as conduct affecting import trade  
 20 or commerce, or this has no meaning. There would be no  
 21 conduct involving import trade or commerce left to analyze  
 22 here. So, conduct involving import trade or import commerce  
 23 must be given a narrow construction.

24 So, and again, it's because the import commerce  
 25 exception is intended just to be a quick look. A presumption.

1 If the conduct involves import trade or commerce, it's so  
 2 obvious that it's going to have the correct effect, the  
 3 inadequate effect on U.S. commerce, we don't need to bother  
 4 with the effects test.

5 But if it's a close call, if it's not crystal clear  
 6 that the conduct directly targets an import market or  
 7 possibly, even as the Third Circuit said in Carpet Group,  
 8 solely targets an import market as the defendants did in that  
 9 case, the only case plaintiffs cite in which the Court held  
 10 that yes, the import commerce exception applies, then you've  
 11 got to get to the effects test.

12 So, the conclusions from the proper construction and  
 13 application of the operative words from the import commerce  
 14 exception are: One, the relevant conduct here. The relevant  
 15 conduct was only the alleged agreement to fix prices, and then  
 16 the application of that agreement in the imposition of the  
 17 overcharges. The flying of the planes, the unloading of the  
 18 cargo, where they went is irrelevant. The harm that  
 19 plaintiffs are alleging arose from the imposition of the  
 20 overcharges, and it didn't fly with the cargo in the belly of  
 21 the aircraft to wherever the aircraft is going.

22 THE COURT: So, your definition of conduct involving  
 23 trade, to the extent that it applies in this case, is the  
 24 actual application of the charge to a particular item that's  
 25 being transported.

1                   MR. SCHWARTZ: I think, Your Honor, that there are,  
 2 that is the second and here the operative element.

3                   I think the predicate element has to be the  
 4 agreement to fix prices, which is the essence of the  
 5 violation. But obviously, without the imposition, the conduct  
 6 didn't harm the plaintiffs.

7                   THE COURT: Well, but for domestic, for purchases of  
 8 air transport services occurring domestically, the agreement  
 9 may have been abroad, it's the imposition of the charge here  
 10 that you concede gives rise to Sherman Act jurisdiction.

11                  MR. SCHWARTZ: That's correct. If it is a domestic  
 12 transaction. And domestic pricing, presumably applied, so  
 13 yes, we're not arguing, we're not moving such transactions.

14                  THE COURT: Okay.

15                  MR. SCHWARTZ: Now, let me just touch briefly. We  
 16 don't need to go back to the slide.

17                  The Kruman transaction, again, plaintiffs tried to  
 18 distinguish Kruman and Turicentro and CSR by saying all these  
 19 cases, the facts here unlike the facts here, had only  
 20 incidental contact with the United States and began and ended  
 21 in foreign, not domestic commerce.

22                  We saw, of course, that's completely incorrect with  
 23 respect to Charlotte Kruman, with respect to other class  
 24 representatives. The transaction began and ended with  
 25 Charlotte Kruman in the United States.

1                   THE COURT: But that was a purchase of goods in a  
2 foreign market.

3                   Here we're talking about a purchase of services  
4 which arguably, and I think the plaintiffs argue, actually  
5 occurs both places. I mean, the service occurs both abroad  
6 and here.

7                   MR. SCHWARTZ: Well, I think that the, I have two  
8 points about that, Your Honor.

9                   I think Kruman is directly analogous to here. What  
10 the relevant -- what Charlotte Kruman purchased that was  
11 relevant for purpose of plaintiffs' claims, as the Court  
12 correctly held, was the purchase of the auction services. The  
13 watch came out of that. The plaintiffs in that case were not  
14 claiming that Charlotte Kruman or anyone else overpaid for the  
15 good, it was for the service being provided at auction.

16                   Just as here, plaintiffs are claiming that they  
17 overpaid for the service.

18                   THE COURT: But the service, again, occurred  
19 entirely overseas. The auction occurred over there. I mean,  
20 as opposed to the transportation of goods.

21                   MR. SCHWARTZ: Well, Your Honor, I respectfully  
22 suggest that a very significant part of the defendant's  
23 conduct in Kruman occurred in the United States. Christie's  
24 New York showed her the watch. Christie's New York took the  
25 bid from her. We don't know, it's not addressed, Christie's

1 New York may have actually sent her the bill and received the  
 2 payment reflecting the overcharge for the buyer's premium.

3 Another named plaintiff, Sophie Magee, resident of  
 4 Flint, Michigan -- this by the way is in the complaint filed  
 5 by Cohen & Milstein. Sophie Magee resident of Flint, Michigan  
 6 wanted to sell paintings at auction. Goes to visit with  
 7 Sotheby's Chicago. Sotheby's again, is a Michigan company.  
 8 Makes arrangements to have those paintings auctioned in  
 9 London. Sotheby's puts them on tour in the United States,  
 10 Boston, New York and then two foreign cities. Paintings are  
 11 sold. Allegedly, inflated seller's commission is charged by  
 12 Sotheby's.

13 Sotheby's had a lot of action in the United States  
 14 on that transact.

15 I on, but the relevant conduct was the imposition of  
 16 the alleged overcharge to the seller's commission in the  
 17 London auction. So, the conclusion in that case was it  
 18 doesn't matter; that whatever happened in the United States is  
 19 not the alleged conduct that violated the Sherman Act.

20 Just as the Second Circuit said in Kruman. It is  
 21 only that conduct that violated the act that is relevant in  
 22 applying the narrow threshold import commerce test.  
 23 Everything else, we don't care about.

24 Just as in Turicentro, a case brought by foreign  
 25 travel agents against four U.S. carriers in IATA, claiming a

1 conspiracy to fix commissions paid to foreign travel agents.  
 2 Didn't matter that they're domestic carriers, they're  
 3 obviously flying in and out of the United States, tickets were  
 4 sold to U.S. passengers who are coming in and out of the  
 5 United States. The facts there are directly analogous to  
 6 those here.

7 Travel agents there play the role of middlemen  
 8 between the ultimate consumer of the service being provided by  
 9 the air carrier and the carrier, just as the forwarder does  
 10 here for the shipment of freight.

11 But, the operative fact is that it was foreign  
 12 commissions, commissions being paid to foreign travel agents  
 13 that were fixed in that case. And so, the Court said, it  
 14 doesn't matter that there were, that defendant had contacts in  
 15 the U.S., didn't matter there were passengers flying in and  
 16 out of the U.S., didn't even matter they were U.S. carriers.  
 17 Just as here, this again could not be more clear when we're  
 18 talking about the foreign purchasers under Counts 3 through 5.

19 Can we go to the first map slide, please.

20 (The above-referred to slide was published to the  
 21 courtroom.)

22 MR. SCHWARTZ: It might be helpful, just to  
 23 illustrate briefly a hypothetical transaction falling within  
 24 Counts 3 through 5. This is one brought, hypothetically under  
 25 Count 4, brought by purchasers for shipments between Europe

1 and the United States.

2 So, if a shipper wants to send goods from Spain, and  
3 let's assume the forwarder is a direct purchaser claim. The  
4 forwarder is the plaintiff. The shipper would contact the  
5 forwarder in Spain and reach agreement for a price, a rate,  
6 possibly surcharges, here properly denominated in Euros on the  
7 agreement.

8 Next slide, please.

9 (The above-referred to slide was published to the  
10 courtroom.)

11 MR. SCHWARTZ: The next step would be the freight  
12 forwarder, this is the plaintiff, would make arrangements with  
13 a carrier. An agreement that would include, of course, what  
14 the forwarder's going to ship, crates of wine, to a  
15 destination and a price. It would be the rate and it would be  
16 the surcharge that the carrier imposed.

17 THE COURT: I see. Okay. Sorry, I did something  
18 here.

19 (Discussion held off the record.)

20 (Pause in the proceedings.)

21 THE COURT: Okay. Thank you.

22 MR. SCHWARTZ: Okay, here we go.

23 Of course, the carrier and the forwarder are going  
24 to agree on a rate and any applicable surcharges. This is the  
25 element of the transaction that allegedly violated the

1 Sherman Act for purpose of this claim. This is the conduct  
2 that's relevant.

3 Can we go to the next slide, please.

4 (The above-referred to slide was published to the  
5 courtroom.)

6 MR. SCHWARTZ: And the plaintiffs are not contending  
7 that they would have a claim for this transaction if the wine  
8 was shipped to Dublin.

9 Now, they are seeking relief under the EC Treaty  
10 under Article 81, but they concede there's no Sherman Act  
11 jurisdiction for this claim.

12 Next slide, please.

13 (The above-referred to slide was published to the  
14 courtroom.)

15 MR. SCHWARTZ: And it doesn't matter whether the  
16 wine is going to Dublin, or Paris, or Brussels, or Frankfurt,  
17 or anywhere else in Europe, it's the exact same result.

18 Next slide please.

19 (The above-referred to slide was published to the  
20 courtroom.)

21 MR. SCHWARTZ: And indeed, it doesn't matter whether  
22 the wine is shipped to Dublin, or Frankfurt, or Paris, or  
23 New Delhi or even New York.

24 The harm was felt with the imposition of the alleged  
25 overcharge when the carrier reached agreement with the freight

1 forwarder in Spain.

2 The sole case that the plaintiffs' cite in which the  
 3 Court held that the import commerce exception applied  
 4 completely supports these conclusions and the analysis, as  
 5 reflected in our motion, Your Honor, Carpet Group the Third  
 6 Circuit decision in Carpet Group.

7 Plaintiff retail rug importer, a rug importer sued  
 8 an association of wholesaler rug importers. The Oriental Rug  
 9 Importers Association accused the defendants -- and some of  
 10 its members and officers -- plaintiff accused the defendants  
 11 of conspiring to block plaintiff's efforts to import rugs  
 12 directly from foreign countries and thereby cutting out the  
 13 wholesaler rug middlemen defendants.

14 The Court held that that conduct involved import  
 15 commerce because the defendants' conduct solely targeted what  
 16 was clearly an import market. The defendants describe  
 17 themselves as importers. The defendants' conduct was targeted  
 18 directly at reducing imports, the quantity of imports, the  
 19 volume of imports of rugs into the United States, thereby  
 20 raising the price, effectively.

21 Interestingly, the Court held that it was because  
 22 that conduct so directly targeted an import market that the  
 23 import commerce exception applied. And the Court held that if  
 24 the defendants had only taken steps to one, prevent or at  
 25 least dissuade the foreign export countries, Pakistan and

1 India, from supporting the plaintiff's rug trade shows by  
 2 getting its suppliers in those countries to attend the shows,  
 3 or two, even if the defendants had only done that and tried to  
 4 dissuade rug retailers in the U.S. from supporting the  
 5 plaintiff's shows, even that conduct may have been too  
 6 indirect standing alone to involve import commerce for purpose  
 7 of the narrow threshold import commerce exception. It was  
 8 only because the defendants also targeted their own members  
 9 and dissuaded them, that was direct enough. This is the only  
 10 case the plaintiffs cite. The only case.

11 And what we have here is --

12 THE COURT: They were looking at the effects test  
 13 then; were they not?

14 MR. SCHWARTZ: I believe that they were looking --  
 15 in the application of the import commerce exception,  
 16 Your Honor, they were looking solely at the defendants'  
 17 conduct. They were looking at the conduct.

18 What did the conduct target? What market did it  
 19 target is the real question.

20 And the Court held properly in that case that  
 21 defendants' conduct targeted solely what could only be fairly  
 22 characterized as an import market for rugs.

23 THE COURT: Okay.

24 Maybe you should take a couple minutes on standing  
 25 and I'll let the plaintiffs respond.

1                   MR. SCHWARTZ: If I could very briefly address  
 2 6(a)(2), Your Honor.

3                   THE COURT: Okay.

4                   MR. SCHWARTZ: We don't think that there's a  
 5 legitimate dispute over this. The plaintiffs clearly don't  
 6 satisfy the proximate cause test, which they must satisfy  
 7 under the Empagran II test, and which every other court has  
 8 addressed.

9                   The plaintiffs' allegations are, for example, that  
 10 the defendants' conduct had adverse effects on -- that the  
 11 adverse effects of defendants' conduct are interdependent  
 12 with, and are linked between foreign and U.S. commerce.  
 13 Defendants could not have maintained their international price  
 14 fixing arrangement without impacting adversely the price of  
 15 the various freight shipping services to, from, within the  
 16 U.S. It's all a "but for" test. It's a "but for" argument.  
 17 It's all the -- it's precisely the kind of "but for"  
 18 interdependence arbitrage theory that every court to address  
 19 it, including Ciano, III, and Latino Qui mi ca have properly  
 20 rejected. And we just don't think there's a legitimate issue  
 21 at this point.

22                   Your Honor, what I would like to do at this point is  
 23 since standing is, for us, a separate argument, if that's okay  
 24 with you, is to give the plaintiffs an opportunity to address  
 25 FTAIA. And then if it's okay, I'll do an encore and address

1 standing, briefly?

2 THE COURT: All right. Let's do it that way.

3 That's fine. Because I'm going to have you back anyway, so.

4 MR. SCHWARTZ: Okay.

5 THE COURT: All right. Mr. . .

6 MR. TOMPKINS: Tompkins, Your Honor.

7 THE COURT: Tompkins. Yes, thank you.

8 COURTROOM DEPUTY: Counsel, are you using a podium  
9 laptop as opposed to the table?

10 MR. TOMPKINS: Laptop.

11 COURTROOM DEPUTY: Okay.

12 (Pause in the proceedings.)

13 ARGUMENT I

14 BY MR. TOMPKINS:

15 MR. TOMPKINS: Well, let me start by saying the  
16 plaintiffs and defendants do agree on a number of elements in  
17 this case. We apparently agree on -- that's heartening. We  
18 apparently agree that the relevant test is whether the conduct  
19 involves import commerce.

20 THE COURT: So, are you conceding that you're really  
21 not relying on the domestic effects aspect?

22 MR. TOMPKINS: I'm not saying that we don't meet the  
23 domestic effects test. However, I am saying we never have to  
24 get there.

25 It's a challenging and difficult conceptual analysis

1 that we just don't have to reach because in this case, the  
 2 question of whether or not the conduct involves import  
 3 commerce is a pretty straightforward question.

4                   And I think the challenge in a case that is as  
 5 straightforward as this is that the parties are analogizing  
 6 from hard cases back to easy cases. Some of these hard cases  
 7 that the parties have been talking about communications and  
 8 foreign markets are much more challenging than a case here,  
 9 which involves an alleged price fix on the cost of shipping a  
 10 good to the United States.

11                  Let me just start by saying, the defendants concede  
 12 that they challenge they're only moving as to purchases in  
 13 foreign markets of air freight shipping services for shipments  
 14 from foreign countries to the U.S. So, what they're  
 15 challenging is shipping services when goods, imports, are  
 16 loaded onto planes and flown to the U.S. by air.

17                  That makes the analysis much simpler, frankly,  
 18 because the Kruman's case, and the defendants also -- I won't  
 19 belabor this point -- the defendants also agree that the  
 20 question is whether their conduct involved import commerce.

21                  I'm going to skip this slide because this analysis  
 22 is not necessary.

23                  So, the question is, what conduct involves import  
 24 commerce? And that question has essentially already been  
 25 answered by the Second Circuit in the Kruman's case. If you

1 read the quote there, in the Kruman case, what you were  
 2 dealing with was a commission that was charged by a service,  
 3 by an auctioneer basically abroad.

4 What the Court said was that that did not qualify as  
 5 conduct involving import commerce. And the Court specifically  
 6 contrasted it with conduct that would involve import commerce.  
 7 And that would be conduct that involved trade in, and  
 8 subsequent movement of goods.

9 Now, here, Your Honor, this case involves the  
 10 subsequent movement of goods into the United States. What the  
 11 defendants do, the service they provide is to fly goods into  
 12 the United States. And the conduct was to allegedly increase  
 13 certain surcharges that increase the cost of flying goods into  
 14 the United States.

15 THE COURT: But the critical word there is of the  
 16 goods that were purchased and sold, isn't it? I mean, trade  
 17 in and subsequent movement of the goods that were purchased  
 18 and sold. It's not just of, you know, the focus is not on  
 19 movement. It's on goods.

20 MR. TOMPKINS: Your Honor, the focus is on what  
 21 involves import commerce. And it's important to think about  
 22 the fact that that's a phrase, not a word. It's not just  
 23 imports, obviously. It's something that is broader than that.  
 24 And the question is: What conduct involves import commerce?  
 25 Well, obviously, fixing the price of imports does. But

1 something else has to, as well, because otherwise the phrase  
 2 wouldn't be involves import commerce, it would be imports.

3                   And the question is: If conduct targeting the cost  
 4 of shipping a good into the United States doesn't involve an  
 5 import commerce, what would? It seems like this is a  
 6 clear-cut case.

7                   But what the defendants have done is they have  
 8 agreed among themselves to increase the cost for an importer  
 9 who wants to ship something here. That should be conduct that  
 10 involves import commerce under any reasonable application of  
 11 that phrase.

12                   And importantly, it's conduct that the  
 13 Second Circuit has already indicated is at least sufficient.  
 14 I'm not suggesting this sets the outer bounds of what might  
 15 qualify as involving import commerce, but I am saying that  
 16 this identifies examples of conduct that does involve import  
 17 commerce. And one of the examples is commerce directed at the  
 18 subsequent movement of goods into the United States.

19                   Does that answer your question?

20                   THE COURT: It answers up to a point. But no, it  
 21 ultimately, everything turns, it seems to me, on whether the  
 22 providing of that service, whether the, for the Court -- what  
 23 I'm grappling with is where is the service provided, and what  
 24 is, what is the market for the service, and where is that  
 25 market? And I'm not sure that either side has yet helped me

1 find the solution to that question.

2 MR. TOMPKINS: Let me try and address that question  
 3 first by focusing on the word conduct, per se.

4 The defendants' conduct under Mr. Schwartz' analysis  
 5 was fixing the service provided abroad. That definition is  
 6 clearly too narrow because if that definition applied, then  
 7 you could fix the price of an actual import abroad, let's say  
 8 the wine example. You fix a price for a case of wine and then  
 9 ship it to the United States. I mean, that would be --  
 10 clearly, fixing the price of a case of wine that is shipped to  
 11 the United States involves import commerce. It seems like  
 12 that must, if anything does.

13 So, looking at the conduct as merely being the fix  
 14 in a foreign location cannot be the correct analysis.

15 What you have --

16 THE COURT: But let's take the Kruman's case. The  
 17 Kruman's case, the price of the good was fixed abroad. Now,  
 18 the good could have gone anywhere. It wasn't found for the  
 19 United States, necessarily, could have gone anywhere. But,  
 20 the price was fixed abroad, brought to the United States. The  
 21 United States purchaser of the good was affected by that.

22 So, why isn't that actionable? I mean, you're  
 23 saying if the price is fixed abroad and comes to the  
 24 United States, it's actionable under the Sherman Act.

25 MR. TOMPKINS: Well, if the price of the import is

1 fixed abroad and it comes into the United States, that's  
 2 conduct involving import commerce.

3                   But to answer your questions about Kruman's, the  
 4 service, the service there was providing an auction service.  
 5 It occurred exclusively in the foreign market. The auction  
 6 took place in a foreign market, it was completed in foreign  
 7 market. And when it was done, the good could be shipped  
 8 anywhere.

9                   THE COURT: You're right.

10                  MR. TOMPKINS: If you paid a hundred Euros for the  
 11 good, you could ship it to the United States or you could ship  
 12 it France.

13                  Here, the service that is being provided is the  
 14 service of shipping something to the United States. I think  
 15 the way we expressed in the briefs is this: In the Kruman's  
 16 case, once the auctioneer finished and the good was sold, the  
 17 service was done. You could not complain to the auctioneer  
 18 about the service being inadequately performed. There was  
 19 nothing left to do.

20                  Here, once I pay for my, the shipment in England or  
 21 in Spain -- the plane has to fly to the United States and  
 22 arrive in the United States for the transaction to be  
 23 complete. To put it in the most concrete terms, in Kruman's,  
 24 once I buy the auctioned good, no matter where it goes, I  
 25 can't go back to the auctioneer and say give me my money back

1 because the auctioneer has performed the service that he or  
 2 she was hired to perform.

3                 Here, in contrast, if the defendant didn't fly the  
 4 good to the United States, you could get your money back. And  
 5 that makes a big difference in the analysis. The service is  
 6 provided, it starts abroad, but it ends in the United States  
 7 by definition.

8                 THE COURT: I understand.

9                 MR. TOMPKINS: Okay.

10                 I think one point to highlight is that this case is,  
 11 because it involves the transportation industry, it is very  
 12 different than these other cases that have been analyzed. And  
 13 I think it's one of the -- that was one of my opening points  
 14 was that it's hard to take cases involving the Kruman's and  
 15 Turi centro case. At their heart they stand for the  
 16 proposition that you can fix the price of foreign auction, you  
 17 can fix the charge for a foreign auctioneer's services, and it  
 18 doesn't matter where the product is shipped. Excuse me,  
 19 commisioned. A foreign commision can be fixed. Kruman's  
 20 involves auctions. Turi centro involves travel agents, but  
 21 essentially, you can fix the commision charged by a foreign  
 22 agent.

23                 These cases are different, because what's being  
 24 fixed here is the cost of shipping something into the United  
 25 States. So, you can't take those Kruman and Turi centro cases

1 too far or else you leave no conduct left that quote, involves  
 2 import commerce.

3                   And again, I come back to the point that the conduct  
 4 in this case targeted the movement of goods into the  
 5 United States. That's the target. The service for the  
 6 movement of goods into the United States was targeted by  
 7 defendants' conduct. In fact, let me go to the next slide  
 8 here to highlight this point.

9                   One of the specific allegations in the complaint is  
 10 that the defendants agreed to charge flat fees to air freight  
 11 customers for the defendants' preparation and submission of  
 12 U.S. Customs required manifests. And let me just explain that  
 13 for a second.

14                   After 9/11, the U.S. Customs Department began to  
 15 require that the air carriers, while they were en route,  
 16 provide a manifest of all the goods on their plane. It only  
 17 applied to the United States. It was a requirement that U.S.  
 18 Customs instituted and only obviously was applicable to  
 19 flights coming here.

20                   The defendants first decided that they wanted to  
 21 impose a surcharge to recapture the cost of complying with  
 22 that requirement. And then, they, at least allegedly in the  
 23 complaint, they agreed on the amount of that surcharge.

24                   Now, it's hard to imagine conduct more clearly  
 25 targeting the United States market, more clearly targeting the

1 market for United States' imports than an agreement by the  
 2 defendants to fix the actual cost of complying with U.S.  
 3 Customs requirements that are required of importers to the  
 4 United States.

5 So, to argue that this is somehow was a conspiracy  
 6 targeting a foreign market is just not patently plausible.

7 THE COURT: At least that aspect of it as opposed to  
 8 some of the other surcharges.

9 MR. TOMPKINS: The fuel surcharge, for example, it's  
 10 not as clear because it doesn't have U.S. Customs in the  
 11 title, but the surcharge is for the cost of fuel of flying the  
 12 plane to the United States. The fuel wouldn't be expended if  
 13 the plane wasn't flying here. When the price of fuel rose,  
 14 the defendants agreed among themselves to recapture those  
 15 costs.

16 THE COURT: But the fuel surcharges applied across  
 17 the board. It wasn't targeted at shipments to the  
 18 United States. As I understand it, it was targeted to  
 19 shipments anywhere.

20 So, to the extent, I'm taking from your argument  
 21 that you're focusing on the case that you cited, and the  
 22 defendants were distinguishing with respect to the targeting  
 23 of the, any competitive conduct of price fixing to the  
 24 United States market, but go ahead.

25 MR. TOMPKINS: Well, let me be clear. The fuel

1 surcharge did apply no matter where the goods were going, but  
 2 plaintiffs are only seeking relief under the Sherman Act for  
 3 the fuel surcharges that were applied to shipments into the  
 4 United States. For those fuel surcharges, the charge itself  
 5 was a charge imposed to recapture the cost of flying here.  
 6 And in that case, it was clearly directed at U.S. commerce.

7 I mean, you are correct that a fuel surcharge  
 8 directed at a flight into China, for example, might affect  
 9 Chinese commerce. But here we're limited to flights within  
 10 the United States, and so it did target U.S. commerce.

11 THE COURT: I understand.

12 MR. TOMPKINS: I also note that the defendants'  
 13 argument regarding the tax statute -- let me move on to that  
 14 for a second, because it's one of the highlights of the  
 15 argument. That is, you have to read the term "involved" --  
 16 the phrase "involves import commerce" narrowly in order to  
 17 give meaning to the second prong of the statute.

18 There are two points to make with that: One, the  
 19 defendants aren't reading the phrase "involves import  
 20 commerce" over broadly. They're reading the phrase "involves  
 21 import commerce" to include conduct directed at the market for  
 22 imports, or the market for the subsequent movement of imports  
 23 into the United States. That leaves lots of conduct that  
 24 potentially could have a direct, you know, foreseeable effect  
 25 on the U.S. import market, but does not itself involve the

1 U. S. import market.

2 And two examples of that are actually contained in  
 3 the Department of Justice Antitrust Enforcement Guidelines,  
 4 which are foreign vertical restrictions, and certain  
 5 intellectual property licenses might be conduct that would not  
 6 involve U. S. import market, but could nevertheless have a  
 7 direct and foreseeable effect on the U. S. import market.

8 I only raise these examples to address this, the  
 9 statutory concerns the defendants raise. It really is not --  
 10 it has no weight because plaintiffs' reading of the import  
 11 commerce exception is not nearly as broad as the defendants  
 12 would suggest.

13 THE COURT: What is the, moving to the standing  
 14 argument -- what is the antitrust injury here for the foreign  
 15 purchased service?

16 MR. TOMPKINS: The foreign purchased service suffer  
 17 the same antitrust injury as the domestic purchaser. They  
 18 paid more to ship goods into the United States than they would  
 19 have otherwise.

20 In the context of import commerce, it's important to  
 21 remember --

22 THE COURT: But why is that an antitrust injury here  
 23 if the foreign purchaser is purchasing it overseas?

24 MR. TOMPKINS: Two reasons: One, because Congress  
 25 passed the FTAIA and specifically excluded from its gamut

1 conduct involving the import commerce market. That is -- a  
2 harm directed at the U.S. import market is going to, almost by  
3 definition, be a harm directed to some degree, to a large  
4 degree, at U.S. importers who are themselves likely to be  
5 foreign entities.

6 THE COURT: So, are you saying that once -- that  
7 there is no separate -- once the Court finds, if it does, that  
8 the FTAA does not bar the claims here, then it necessarily  
9 follows that there is antitrust standing.

10 MR. TOMPKINS: In the context of this case, yes,  
11 Your Honor. I'm not sure. There may be certain cases out  
12 there. I know the defendants have not cited any cases where  
13 the manufacturers have satisfied the FTAA and then failed the  
14 standing test. The cases that are cited are cases where  
15 essentially, the standing analysis just follows on.

16 THE COURT: Okay. So, the antitrust injury here is  
17 the fact that somebody in the United States is going to pay  
18 more because there's a bigger charge on the transportation of  
19 goods to the United States?

20 MR. TOMPKINS: The antitrust injury to the  
21 plaintiffs -- remember, the domicile of the plaintiff is  
22 irrelevant to the analysis.

23 The antitrust injury to the plaintiffs is that they  
24 paid more to ship goods to the U.S. than they would have  
25 otherwise.

1                   THE COURT: But the anti trust injury has to be here,  
2 as I understand. Doesn't it? It has to occur here.

3                   MR. TOMPKINS: I'm not sure I understand the  
4 question, Your Honor. The anti trust -- I mean, the injury to  
5 the U.S. economy --

6                   THE COURT: Yes.

7                   MR. TOMPKINS: Okay. I'm sorry.

8                   The injury to the U.S. economy is that it costs more  
9 to ship goods to the U.S. than it otherwise would have, but  
10 it's the same injury that occurred to the importers. It costs  
11 them more to ship goods here. The U.S. economy is invariably  
12 harmed by an agreement to increase the cost of importing goods  
13 here. That's precisely why, as Mr. Schwartz conceded,  
14 Congress created an exception for the FTAIA for import  
15 commerce. It's a quick look, as he said. If something  
16 involves import commission, it's got to have a direct and  
17 reasonably foreseeable effect on U.S. commerce. Because  
18 fixing the cost of bringing goods here impacts U.S. commerce  
19 almost by definition. That's why it's excluded.

20                   Does that answer your question?

21                   THE COURT: I'm not sure it does. I think what  
22 you're saying, it comes back to, to whether or not the Court  
23 finds that this involves import commerce. If it involves  
24 import trade or commerce, then you're saying, by definition,  
25 therefore, it must be an anti trust injury for purposes -- an

1 United States anti trust injury as opposed to foreign anti trust  
 2 injury.

3 MR. TOMPKINS: I think that's the importance of the  
 4 import commerce exclusion, Your Honor. There's two ways that  
 5 you can have an anti trust claim for a foreign -- involving a  
 6 foreign entity.

7 One is, if you meet the two-prong test. And that is  
 8 a test designed by its very nature to determine whether there  
 9 is impact, sufficient impact, on U.S. commerce. That's in the  
 10 first prong of the test.

11 But the other way to satisfy that is to show that  
 12 the conduct involved an import market. As Mr. Schwartz said,  
 13 you don't have to do any more because once you know the  
 14 conduct involved the U.S. import market, it, by definition,  
 15 harmed U.S. commerce. That's why Congress wrote that  
 16 exclusion in the first place.

17 And to go through to the standing analysis, the  
 18 plaintiffs have alleged an anti trust injury, which is they  
 19 paid too much for their goods. And critically, they're not  
 20 only the most efficient enforcers, they're really the only  
 21 enforcers. And this is something that has to be considered in  
 22 light of the nature of imports.

23 Congress has said that conduct involving import  
 24 commerce is unlawful. There is no body, no entity that can  
 25 force and seek redress for that conduct except for importers.

1 And importers are largely going to be foreign entities. That  
 2 is one thing we agree on.

3 So, there is no effective means of redress if the  
 4 plaintiffs here aren't allowed to bring their claims. Not  
 5 only are they the most efficient enforcers, if they aren't  
 6 permitted to enforce their plans, what will end up happening  
 7 is all the purchases for inbound shipments that occurred  
 8 abroad, which was most of the purchases, there will be no  
 9 ability for any plaintiff to claim damages based on those  
 10 purchases.

11 THE COURT: At least not here.

12 MR. TOMPKINS: Well.

13 THE COURT: They could presumably, assert the claims  
 14 overseas.

15 MR. TOMPKINS: But the assertion of the claims  
 16 overseas isn't going to redress the harm to U.S. commerce  
 17 necessarily, especially not in the fashion that Congress  
 18 intended it. I mean, the Sherman Act sets up a system that is  
 19 designed to deter and redress violations that impact U.S.  
 20 commerce. And Congress has decreed that conduct involving  
 21 U.S. commerce creates that requisite impact.

22 THE COURT: I understand.

23 MR. TOMPKINS: And so, in order to enforce that  
 24 intent of Congress, the importers in this case have to be  
 25 allowed to bring their claims. If they're not, they'll be

1 under deterrence within the United States, under deterrence on  
 2 the effect of U.S. commerce.

3 Remember, U.S. commerce was affected by the  
 4 inter-shipping costs. The amount of that effect cannot be  
 5 redressed unless the importers are allowed to pursue their  
 6 claims.

7 THE COURT: All right. Thank you.

8 Mr. Schwarz? Yes, I'll give you five minutes or so.

9 MR. SCHWARTZ: Very briefly, Your Honor.

10 ARGUMENT I

11 BY MR. SCHWARTZ:

12 MR. SCHWARTZ: First, I'd like to respond briefly to  
 13 some of the FTIA arguments made by Mr. Tompkins.

14 First, Mr. Tompkins made the point that because this  
 15 case involves the substantive movement of goods, that that  
 16 must involve -- in effect, Defendants' conduct must involve  
 17 import commerce. But that argument is completely contrary to  
 18 the holding in Turi centro. It must be construed narrowly or  
 19 there's nothing left to analyze for import commerce in the  
 20 effects test of 6(a)(1). It has to be much more narrow than  
 21 Mr. Tompkins is arguing. And plaintiffs did not address that  
 22 point for the Turi centro Court's holding in their opposition.

23 Second, when plaintiffs argue that this conduct must  
 24 involve import commerce to the U.S. because the conduct  
 25 increased the price of shipping goods to the U.S., that's an

1 effects argument. You don't get to that issue unless the  
 2 conduct falls within the scope of the FTAA and is subjected  
 3 to the effects test codified in 6(a)(1) and 6(a)(2).

4 THE COURT: Well, but I understand the distinction  
 5 you're making between the effects test and the first part of  
 6 the FTAA definition of what's barred, or remains under the  
 7 Sherman Act.

8 It's, it's hard to keep this all straight in terms  
 9 of the negatives. The FTAA bars jurisdiction except for  
 10 import commerce.

11 But in any event, but one way to try to define  
 12 whether it's import commerce or not is whether or not it does,  
 13 in fact, affect the price of goods here.

14 I mean that's their argument, I think. It's, you  
 15 know, how to define what is, what does import commerce, what  
 16 does that phrase encompass, import trade and import commerce,  
 17 what does it encompass. Well, they will argue that it  
 18 encompasses anything that, in fact, affects the price of goods  
 19 that are imported into the United States.

20 MR. SCHWARTZ: That does seem to be their argument,  
 21 but I think it's completely contrary to the proper application  
 22 of the import commerce exception. Because the exception  
 23 applies only where the defendant's conduct directly targets an  
 24 import market, and the conduct --

25 THE COURT: Well, what about the surcharge for, you

1 know, the manifest, the cost of manifest, the surcharge of the  
 2 manifest, directly targets the imports to the United States.

3 MR. SCHWARTZ: Where a foreign freight, freight  
 4 forwarder, let's say someone in Spain, contacts, makes an  
 5 agreement with the carrier in Spain to pay any, whatever the  
 6 price is, the all-in price, which would include the rate, and  
 7 surcharges, fuel surcharge, whatever else was applied,  
 8 including this, maybe it's called a Customs surcharge --

9 THE COURT: Yes.

10 MR. SCHWARTZ: -- the carrier is still setting the  
 11 price and applying the price in Spain.

12 Just as Mr. Tompkins said, it really is just like  
 13 the fuel surcharge. The fuel wouldn't be expended if the  
 14 plane wasn't going to the United States. And maybe even  
 15 there's some relationship between the amount of fuel surcharge  
 16 imposed on shipments originating from Spain with fuel costs in  
 17 the U.S. We don't know. It doesn't matter. Just like it  
 18 doesn't matter --

19 THE COURT: What if the contracting is done abroad  
 20 for the provision of services entirely within the United  
 21 States.

22 I mean, I don't know, let's say somebody -- you  
 23 contract with a foreign construction company to build  
 24 something here in the United States. And they fix the price  
 25 abroad, but the services are all provided here, as opposed to

1 this. I mean, here we have services provided, they would  
2 argue in two places. I mean, both abroad and here.

3 And anyway, I'm struggling with where the service,  
4 to some extent, where the service is provided, and how that  
5 affects the definition of import commerce.

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7 (Continued on following page.)

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1 ARGUMENT I

2 BY MR. SCHWARTZ: (Continuing.)

3 MR. SCHWARTZ: (Continuing.) Well, maybe.

4 THE COURT: And how that affects the definition of  
5 import commerce.

6 MR. SCHWARTZ: I think I can directly address that  
7 issue, Your Honor, in the following way.

8 The Court doesn't need to look at that to find  
9 where, and in what places, was most of the conduct. It's just  
10 like in Kruman, arguably there was a whole lot more conduct by  
11 the defendants in the United States than in London, but it  
12 didn't matter because the service, the crux of the plaintiffs'  
13 claim for purposes of foreign auction purchases of services  
14 was overseas.

15 Just like here where we're talking about the  
16 purchase of air cargo services originating from overseas, the  
17 only conduct that's relevant is the imposition of a surcharge.  
18 It doesn't matter that defendants spent a whole lot of time  
19 building terminals, hiring and firing employees in the U.S.,  
20 unloading cargo. It's not the source of plaintiffs' injury,  
21 that's not the nature of the alleged violation.

22 In going to your hypothetical about the  
23 construction that actually is the plaintiffs', what we refer  
24 to as the "American in Paris." An American travels to Paris  
25 and make arrangements for the shipment of goods from the

1 United States. We're not moving as to that, we would say  
 2 that's domestic commerce. And it's not an export, it's not an  
 3 export just like the transaction subject to our motion that's  
 4 domestic. The transactions as to which we are moving are  
 5 foreign.

6 Transportation. It's true transportation, by  
 7 definition, involves movement from point A to point B. The  
 8 Court doesn't need to find a geographical nexus anymore than  
 9 the Court did in Touri centro. It only mattered that foreign  
 10 commissions being fixed.

11 THE COURT: Take just a moment on the notion that if  
 12 it involves import commerce, anti trust automatically follows.

13 MR. SCHWARTZ: Well, first, it's clearly not true  
 14 that the jurisdictional analysis drives the standing analysis.  
 15 In fact, there is one case of the Galvin Supplement that we  
 16 cited in our papers in which the Court held there was subject  
 17 matter jurisdiction but there was no standing.

18 The Court in the Microsoft case, in In Re:  
 19 Microsoft did not address whether or not there was subject  
 20 matter jurisdiction, it went directly to the standing point.  
 21 And, what the -- and what the plaintiffs' argument that if the  
 22 conduct, the defendants' conduct, involves import commerce,  
 23 they must have standing that's clearly incorrect. It may mean  
 24 that somebody has standing, it doesn't mean --

25 THE COURT: Well, who else? I mean, aren't they the

1 ones suffering the injury.

2 MR. SCHWARTZ: Well, there would be domestic  
 3 purchasers who might be better suited to actually bring the  
 4 claim, who might be the more efficient enforcers. It doesn't  
 5 mean that either of their claims can be directly tied,  
 6 directly tied to the conduct affecting U.S. commerce because  
 7 it's an injury test. It's really an effect test, and the  
 8 Court doesn't need to get to that in reaching the import  
 9 commerce test.

10 I want to make one point in response to  
 11 Mr. Tompkins's point that these claims are really drawn from  
 12 Kruman.

13 These goods are coming into the United States  
 14 and the transaction there ended when the auction gavel went  
 15 down and it was over; and here it's very different. The goods  
 16 are coming into the U.S. It's directly analogous if Charlotte  
 17 Kruman, instead of getting her antique watch that she bought,  
 18 got a \$29 Seiko in the box. I don't think that she would have  
 19 considered the transaction to be over.

20 In fact, the plaintiffs argue on appeal in  
 21 Kruman, and we have a copy of the brief if Your Honor would  
 22 like one, that had jurisdictional discovery been permitted in  
 23 that case, the plaintiffs would have been able to show that  
 24 the defendants were directly involved in the shipping of the  
 25 goods in that case in helping the plaintiffs work through

1 customs and arranging transportation and they said expressly  
 2 in their brief that was part of the services that the  
 3 defendants were providing exactly here.

4 The Court didn't need to get into that inquiry.  
 5 The Court did not need to let the parties engage in discovery  
 6 to address that issue. It did not matter that the defendants  
 7 in that case were involved in shipping goods, the stuff came  
 8 to the U.S. any more than it matters here. On the customs  
 9 side, it's all part of the price. Again, it's just like the  
 10 fuel surcharge.

11 THE COURT: Okay. Let's take just a brief recess  
 12 and did you want to say one thing, Mr. Tompkins?

13 MR. TOMPKINS: I have one minute.

14 THE COURT: I will give you a brief recess.

15 ARGUMENT I

16 BY MR. TOMPKINS

17 MR. TOMPKINS: Your Honor, I want to clarify one  
 18 point.

19 The plaintiffs' argument is not that it  
 20 increases the cost of goods imported into the United States.  
 21 I mean, that's certainly likely to be the case, but it's the  
 22 defendants' conspiracy increased the cost of the service. It  
 23 increased the cost of the service, and the service here is  
 24 shipping goods into the United States.

25 I want to make that distinction very clear

1 because the nature of the service is what's critical to the  
 2 import analysis. A service that is directed and the  
 3 subsequent movement into the United States is import commerce  
 4 and it's different than auctioneering services provided in  
 5 these other cases and because it's different, it does involve  
 6 import commerce.

7 It doesn't matter whether they are ultimately  
 8 goods or ultimately the price was increased, that's probably  
 9 true. What matters is it costs more to fly it here and that  
 10 by definition involves import commerce. It's the process of  
 11 importing paid for by importers to carriers who bring things  
 12 here which is to import it.

13 Did I take more than 60 seconds?

14 THE COURT: I don't think so. Well, you know, quick  
 15 question.

16 If it's a foreign exporter who's paying the  
 17 charge, right, for the shipping? Why is that -- you're saying  
 18 it's the importing. We're take Counts 3 through 5.

19 MR. TOMPKINS: Yes.

20 THE COURT: They have a foreign purchaser of the  
 21 services purchasing. Why does that have any -- isn't that too  
 22 indirect in terms of the injury here.

23 MR. TOMPKINS: No. In fact, Your Honor, it's the  
 24 only entity that can bring a direct claim.

25 THE COURT: They can bring a direct claim over in

Argument I - Mr. Tompkins

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1 Europe.

2 MR. TOMPKINS: That's true, Your Honor.

3 THE COURT: The fact -- I mean, the distinction  
4 that's drawn is not because I don't understand the anti trust  
5 laws to be such that, well, we have to give them a forum to  
6 bring their claims if they have a claim.

7 MR. TOMPKINS: But, Your Honor, a claim in Europe  
8 isn't going to address the harm to U.S. commerce. Remember  
9 that for a flight to the U.S. --

10 THE COURT: But, I mean, the harm to U.S. commerce,  
11 that's where I'm having a little difficulty, particularly,  
12 where you have a foreign purchaser. Where you have a foreign  
13 purchaser what is -- what's the harm to U.S. commerce.

14 MR. TOMPKINS: The harm to U.S. commerce is if you  
15 view them simply whether or not they are domestic or foreign.  
16 What harm is it if it costs more to bring goods into the  
17 United States.

18 THE COURT: Okay.

19 MR. TOMPKINS: The --

20 THE COURT: I understand. Okay. So, let's take a  
21 brief recess. Let's get back in seven or eight minutes, so  
22 11:30.

23 (Recess taken.)

24 (Judge VICTOR V. POHORELSKY takes the bench.)

25 THE COURT: All right. Let's see, Mr. Sherman, is

## Argument II - Mr. Sherman

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1 it who will be handle the Twombly, the §12(b)(6) issue.

2 ARGUMENT II

3 BY MR. SHERMAN

4 MR. SHERMAN: Good morning, Your Honor. William  
 5 Sherman from the firm of Latham & Watkins. I represent  
 6 Singapore Air who will be arguing on behalf of the Twombly  
 7 Rule 8 issue.

8 I apologize, I don't have any audiovisual  
 9 matter for the Court. I am going to try to keep you  
 10 interested with the force of my argument.

11 THE COURT: Okay.

12 MR. SHERMAN: And actually, Your Honor, I want to  
 13 start by saying this really should be referred to as the  
 14 Twombly and In Re: Elevator argument because the Court is  
 15 obviously well aware of the Twombly decision and the Second  
 16 Circuit's decision in In Re: Elevator Anti-trust Litigation  
 17 last fall following Twombly.

18 Those two cases from the Supreme Court and the  
 19 Second Circuit really set the stage here for the Court's  
 20 evaluation of the plaintiffs' complaint and really mandates its  
 21 dismissal.

22 Now, the Court, as the Court is aware, the  
 23 Supreme Court's decision in Twombly has established the  
 24 standard for courts considering a motion to dismiss in  
 25 antitrust class actions. Twombly is important here in after

## Argument II - Mr. Sherman

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1 the last two respects.

2                   First, Twombly holds that plaintiffs can't  
 3 simply advance conclusory allegations. Rather, with respect  
 4 to the Section I claim they most quote, "Stating a claim  
 5 requires a complaint with enough factual matter taken as true,  
 6 to suggest an agreement was made."

7                   THE COURT: What more would they have to do here?  
 8 They're specific enough in that they talk about agreements to  
 9 fix surcharges, a variety of surcharges. They specify the  
 10 surcharges, they also said there was agreements on allocating  
 11 customers.

12                   So, what more factual detail does Twombly  
 13 require?

14                   MR. SHERMAN: Well, Your Honor, I'm going to break  
 15 that into two separate answers with respect to the  
 16 non-surcharge allegations and the surcharge allegations.

17                   THE COURT: Okay.

18                   MR. SHERMAN: First, let me answer generally your  
 19 question, because what the plaintiffs allege with respect to  
 20 all of their allegations is very, very little in the way of  
 21 actual factual material that the Supreme Court required and  
 22 In Re: Elevator required.

23                   Those factual allegations where they actually  
 24 allege facts such as a five cent surcharge or a 15 cent  
 25 surcharge are what I understand put into essentially three or

1 four paragraphs in the complaint all with respect to surcharge  
 2 allegations.

3 For the rest, it's exactly the sort of  
 4 conclusory allegations that the Supreme Court in the Second  
 5 Circuit say are not enough. They're formulac re c i t a t i o n s of  
 6 "Defendants conspired," "Defendants met and agreed," but there  
 7 isn't the factual material, the factual material to give, to  
 8 give flavor to that.

9 Now, what could they have done? Well,  
 10 traditionally, what plaintiffs do in these sorts of cases they  
 11 allege parallel conduct. Now, the Supreme Court has said,  
 12 "No." Not in Monsanto, Matsushita, and now Twombly. But  
 13 plaintiffs could have alleged, well, the defendants set  
 14 surcharges and here they are, here are the surcharges, and you  
 15 will see that there are parallel surcharges they were raised  
 16 at the same time, parallel conduct.

17 They allege, for example, that there was a  
 18 refusal to discount. Well, certainly, within their  
 19 information would be the ability to say -- because they're the  
 20 freight forwarders -- "Here are our usual discounts," "Here  
 21 are the discounts we got in the past," "Here, starting at this  
 22 point we got into discounts."

23 None of that sort of thing is in the complaint.  
 24 Was there an opportunity to form a conspiracy? Well, the  
 25 plaintiffs say defendants met and conspired, but there's

1 nothing about when and where.

2 Now, several courts have said, "You're not  
 3 required to give us the facts of all the secret meetings," but  
 4 certainly plaintiffs are required to give some factual  
 5 material. Were there trade association meetings? Were there  
 6 other opportunities that defendants could have met and  
 7 supposedly carried out this conspiracy? Again, that was not  
 8 enough of an opportunity but these are the sorts of factual  
 9 material that the Supreme Court and the Second Circuit would  
 10 presumably accept.

11 Other plus factors of these are all  
 12 traditional ways of alleging. None of this is in the  
 13 complaint, Your Honor, it's all just a little formulaic.  
 14 "They conspired; they agreed," that simply is not enough.

15 Now, let me take it in the two sections because  
 16 there really is a difference with respect to the non-surcharge  
 17 allegations.

18 On refusal to discount which is contained in  
 19 three paragraphs. On concerted increase in yields, whatever  
 20 that means, and it's not explained in the complaint, addressed  
 21 in three paragraphs. The allegation of customers in two  
 22 paragraphs. In all of those allegations, there's no factual  
 23 material at all. There's not even the minimal factual  
 24 material they give us with respect to surcharges, it's simply  
 25 three conclusory paragraphs.

1                   "Defendants met and communicated or met and  
 2 discussed and jointly agreed," and frankly plaintiffs don't  
 3 seriously argue that they give you factual material in there.  
 4 They don't disagree with us, there's nothing there.

5                   What they do is try to save those by saying  
 6 they're synergies. They're synergies between these  
 7 allegations and the surcharge allegations, so you should  
 8 ignore the fact that we don't give you have any factual  
 9 material on these non-surcharge allegations. Well, there's no  
 10 case that says they're allowed to do that, and respectfully,  
 11 the Supreme Court and the Second Circuit decision suggest they  
 12 can't. Either they have factual materials to flesh out the  
 13 claims or they don't and they don't.

14                  Now, just a word on this the synergies, because  
 15 the synergistic effect that plaintiffs want to use to keep  
 16 those, those non-surcharge allegations in the complaint.

17                  First, there's nothing. Not only is there  
 18 nothing about the factual material for non-surcharge  
 19 allegations, there's nothing in the complaint to suggest that  
 20 they're in any way tied to the surcharge allegations. In  
 21 other words, in their briefs they say, "Well, there is an  
 22 synergistic effect," but you can search the complaint in vain  
 23 to find any suggestion in their factual allegations that  
 24 there's any such effect.

25                  Second, if one of the claims is deficient you

1 can't save it by tying it to another one; and this sort of  
2 turns on the one case plaintiffs cite for this synergistic  
3 effect which is the Continental case, but that case doesn't  
4 apply here. That's a case where the Supreme Court looked at  
5 the proof put into the case and the Ninth Circuit looked at  
6 the proof at the end of case. It says nothing about the  
7 requirements in pleading and to the extent that it would apply  
8 here.

18 Now, let me talk for a second by the surcharge  
19 allegations because there is a minimal amount of factual  
20 allegation for actual surcharges; it's essentially in two  
21 paragraphs.

22 They all agree a four-step increase program, five  
23 cents per step. Security surcharge: They make a minimal  
24 factual allegation and the same with their customers  
25 surcharges.

1 Now, we believe that those are not sufficient  
 2 under either Twombly or In Re: Elevator, but what we really  
 3 take exception with, in terms of those surcharge allegations,  
 4 is that there's absolutely nothing tying the allegations to  
 5 any of the particular defendants.

6 It's simply a bl underbuss allegation, nothing  
 7 about who did what or when. And, again, this is the sort of  
 8 factual material that they could have supplied that the  
 9 Supreme Court would request, and the Second Circuit, this is  
 10 where In Re: Elevator really is right on point because there  
 11 are very similar allegations in In Re: Elevator.

12 There, the plaintiffs allege that defendants  
 13 participated in meetings in the United States and Europe to  
 14 discuss pricing and market divisions. They agreed to fix the  
 15 price of elevators and services. They rigged bids for sales  
 16 and maintenance; exchanged price quotes; allocated market;  
 17 exclusively required customers to enter long-term maintenance  
 18 contracts; collectively took actions to drive independent  
 19 repair companies out of business.

20 If anything, if anything, much more factual  
 21 detail and factual matter than we have here; and yet, the  
 22 Second Circuit said the list is in entirely general terms  
 23 without any specification of any particular activities by any  
 24 particular defendant and the Second Circuit affirmed the  
 25 dismissal of the complaint without leave to replead.

1                   THE COURT: Would it be your argument that the  
 2 plaintiffs would have to allege with specificity some conduct  
 3 by each individual defendant?

4                   In other words, say something that each  
 5 individual defendant did that they have to, that they can't  
 6 just say, "Defendants agreed."

7                   MR. SHERMAN: Absolutely, Your Honor. Absolutely.  
 8 That's what In Re: Elevator stands for. We cite a number  
 9 cases in our briefs which stand for the same proposition but  
 10 that's the most recent pronouncement by the Second Circuit on  
 11 that issue.

12                  THE COURT: Now, how far does it get there?

13                  MR. SHERMAN: I'm sorry.

14                  THE COURT: Go ahead.

15                  MR. SHERMAN: That's the question. The questions  
 16 is: How much do they have to say?

17                  THE COURT: How far does it get them when they got  
 18 four defendants who already said we've agreed; we did.

19                  MR. SHERMAN: Yes.

20                  THE COURT: So, and they -- so they've -- it seems  
 21 like that gets them pretty far down the road of talking about,  
 22 at least with those four defendants, that they specifically  
 23 agreed as to various matters.

24                  MR. SHERMAN: And the key to that, Your Honor, I  
 25 agree with you at least, as it applies to those four

1 defendants, it gets them started down the road.

2 Now, does it exclude, does it excuse their need  
 3 and the obligation to put it in their pleading, no. No, it  
 4 doesn't. The Supreme Court has never said that if there's an  
 5 amnesty applicant or if there is a guilty plea. It relieves a  
 6 plaintiff of putting factual material in their complaint; it  
 7 certainly doesn't. It gets them down the road, presumably, of  
 8 being able to make those factual allegations but they haven't  
 9 here, they haven't.

10 And certainly, certainly, it cannot be the  
 11 case -- and this seems to be plaintiffs argument -- because  
 12 they have continually referenced the "Lufthansa Amnesty  
 13 Application" and the guilty pleas. But that cannot be the  
 14 case if a defendant seeks amnesty or if a defendant pleads  
 15 guilty; that, then plaintiffs can file a case against the  
 16 entire industry and say, "Well, it's enough, we've got someone  
 17 who has pleaded guilty; there has to be something to connect  
 18 everyone else to those guilty pleas."

19 And, frankly, the pleas themselves don't do it  
 20 because the pleas do not say we conspired with the entire  
 21 industry. The pleas have of a component, a geographic  
 22 component. Three of the pleas specifically refer to Trans  
 23 Pacific, the plea of B.A.

24 Although the component is necessarily in the  
 25 plea, this discussion of their flights from the U.S. to Great

1 Britain, but there is nothing to suggest there is a conspiracy  
 2 with the entire industry. There is nothing to suggest a  
 3 conspiracy over a worldwide commerce as plaintiffs have  
 4 alleged here.

5 In fact, Lufthansa came into court and told  
 6 Your Honor that the information that they had would probably  
 7 exonerate some of the defendants in the face of that. It  
 8 can't simply be the case and the guilty pleas and Lufthansa's  
 9 amnesty application isn't enough when they haven't alleged  
 10 anything about the particular carriers.

11 And just on that for a second. The plaintiffs,  
 12 of course, answered this which say, "Well, we don't need to  
 13 say anything specific because we allege that all the carriers  
 14 did this."

15 Well, that's not enough, Your Honor. Again, it  
 16 goes back to the conclusory allegation, and frankly, some of  
 17 their complaint believes that because they, in some cases, say  
 18 that certain surcharges were not applied uniformly. They say  
 19 with respect to the security surcharge, with a few exceptions,  
 20 the defendants did this.

21 So, even their own complaint by its terms  
 22 doesn't allow them to say that everybody did everything. And,  
 23 the question of how and why a carrier that doesn't fly, for  
 24 example, a Trans Pacific flight would have had conspired with  
 25 the airlines that do it is never explained by the plaintiffs.

1 There is simply no factual material to support that sort of  
 2 conclusory statement that "Everybody did it and this is the  
 3 nature of the industry." And, in fact, Mr. Schwartz has spent  
 4 some time with you this morning about the nature of the  
 5 industry is here to here, point to here.

6 There are different markets from, for example,  
 7 or different city pairs where you're shipping from point A to  
 8 point B. There's nothing to suggest that a carrier shipping  
 9 Trans Pacific would have any reason or any ability to conspire  
 10 with a carrier who is shipping, say, from South America to  
 11 Africa. There is simply nothing there and plaintiffs have  
 12 given you nothing.

13 THE COURT: So, you're suggesting that there would  
 14 be multiple small conspiracies here with --

15 MR. SHERMAN: I'm obviously not suggesting that.

16 THE COURT: You're not suggesting that, but the  
 17 Court ought to look at it in terms of what that the conspiracy  
 18 couldn't possibly be global because there aren't and many of  
 19 the carriers only operate in certain regions.

20 MR. SHERMAN: That's exactly right, and there is  
 21 nothing here to asking you that. Let's not forget they  
 22 brought 30 something carriers into this case without any  
 23 reason to suggest that there's a reason to do it.

24 And another point that the Court made in  
 25 Twombly is especially important here because although they're

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1 not in court now on the issue of discovery. Plaintiffs' theory seems to let us get by this by saying, "We can open up 2 broad discovery." Well, the Court made it clear that, because 3 of the enormous cost of discovery in these cases, that's not 4 allowable. Indeed, this Court needs to test the allegations 5 to make sure they're plausible with respect to the various 6 defendants before allowing that to happen.

7 Just briefly, Your Honor, on the question of 8 whether the case ought to be dismissed with prejudice. In Re: 9 Elevator, again, is instructive. And, again, there is at 10 that in In Re: Elevator. The plaintiffs here have had plenty 11 of time to perfect their allegations. In fact, this Court 12 invited them to fix their complaint at a previous hearing, 13 they declined.

14 And, in In Re: Elevator, the Court denied 15 leave to replead even in the case of an EC Statement of 16 Probable Wrongdoing because it concluded that the plaintiffs 17 second amended complaint contained as much specificity that it 18 has to muster. Plaintiffs have had the same complaints and we 19 respectfully suggest that Court, in the case Twombly and 20 In Re: Elevator and that ought to be dismissed with prejudice 21 and because they have had their chance and properly pleaded 22 their claims.

23 THE COURT: Okay. Thank you. Mr. Arenson?

24 MR. ARENSON: Yes, it is, Your Honor.

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1                   THE COURT: Okay. Do you have any bells and  
 2 whistles?

3                   MR. ARENSEN: I am too old fashioned and I have no  
 4 bells and whistles and will try not to bother you as well.

5                   THE COURT: I'm still reasonably fresh. By  
 6 1 o'clock or 2 o'clock it will be a different story.

7                   Okay.

8                   ARGUMENT II

9                   BY MR. ARENSEN

10                  MR. ARENSEN: I will introduce myself, at least to  
 11 the court reporter.

12                  I am Greg Arensen of Kaplan, Fox and we  
 13 represent the plaintiffs here.

14                  Let me start first with Twombly. The issue  
 15 there was plausibility. Plausibility of the claims asserted  
 16 there and here, Your Honor, my adversaries tried to  
 17 distinguish between the security, sorry, the surcharge and the  
 18 non-surcharge claims. They have conceded the plausibility of  
 19 the surcharge allegations.

20                  If you take a look at their reply, Page 87,  
 21 they say quote, "They," referring to the plaintiffs, "set up a  
 22 straw man by arguing that the surcharge related allegations  
 23 are plausible.

24                  " The Rule 8 opposition at 15 to 18. "At  
 25 issue, the defendants have not contested for the purposes of

1 this motion. "

2 So, Your Honor, we know that there is a portion  
 3 of the complaint that satisfies Twombly. Those --

4 THE COURT: I don't know if it satisfies Twombly, it  
 5 satisfies the notion of plausibility; and to some extent, it  
 6 would be impossible for the Court to ignore.

7 In the case of four defendants who have pleaded  
 8 or who have accepted responsibility, three pleaded guilty, one  
 9 acknowledged that there's not a plausible antitrust claim, so,  
 10 you know, but I do -- I am troubled.

11 Frankly, I do find an awful lot of generalities  
 12 and not very much specificity about how this price fixing  
 13 occurred; and I'm also very troubled by the fact that we've  
 14 got 30 or however many defendants and as to at least all but  
 15 four of them, there's just nothing at all to indicate what --  
 16 how they participated in what they did and the suggestion that  
 17 there's really a number of different, you know, regions here a  
 18 number of different potential sub-conspiracies if you want to  
 19 call it that if there are conspiracies at all.

20 There's just not very much meat on these bones  
 21 and I'm very troubled by it particularly in light of what  
 22 Mr. Sherman said in, I guess, his penultimate point. Twombly  
 23 was ultimately focused on not unleashing broad, costly  
 24 discovery on the parties without more specificity and,  
 25 frankly, I don't find it here and I am troubled by the fact

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1 that given that you had Lufthansa's cooperation now for a year  
 2 or more there's not more.

3 MR. ARENSEN: The complaint was filed, Your Honor,  
 4 back in February --

5 THE COURT: I understand.

6 MR. ARENSEN: -- of 2007 before we had much of  
 7 Lufthansa's cooperation and we need to take a look at what the  
 8 complaint said.

9 But if I might go back to Twombly for another  
 10 moment because there is another aspect that we think does bear  
 11 on what is troubling Your Honor.

12 THE COURT: Okay.

13 MR. ARENSEN: As I started out, I believe it's  
 14 basically a plausibility case; that, in the Sherman Anti trust  
 15 Case you got alleged facts that will give rise to  
 16 interpretation that the claim is plausible, and I still  
 17 suggest that defendants have conceded we've done that with  
 18 regard to the surcharges but I will put that to the side for  
 19 the moment, though, I want to come back to it.

20 There's also the aspect of notice and Twombly  
 21 made it clear, and it's stated at Page 1974. Quote, "We do  
 22 not require the heightened fact pleading of specifics."

23 And, in Footnote 14 on the previous page, 1973,  
 24 it says quote, "We do not apply any heightened pleading  
 25 standard, nor do we seek to broaden the scope of Federal Rules

1 of Civil Procedure §9. "

2 Clearly, the Supreme Court is telling us once I  
 3 suggest you get over the plausibility hurdle you don't have to  
 4 do as much in order to provide notice to the defendants,  
 5 because if you go to the beginning of the discussion by  
 6 Justice Souter as to what the standard is with regard to  
 7 pleading back on Page 1964 he said quote, "Federal Rule of  
 8 Civil Procedure §8(a)(2) requires only a short and plain  
 9 statement of the claim showing that the pleader is entitled to  
 10 relief in order to give the defendant fair notice of what the  
 11 claim is and the grounds upon which it rests."

12 THE COURT: All right.

13 MR. ARENSEN: So, the purpose to give notice fair  
 14 notice is satisfied by a short and plain statement. It's not  
 15 all of these bells and whistles that Mr. Sherman is suggesting  
 16 we should have all of these opportunities to conspire in  
 17 Africa and Europe and wherever. We don't have to do that,  
 18 that's where the short and plain statement comes in that's  
 19 where Rule 8(a)(2) says we're not in Rule 9(b).

20 THE COURT: The plain statement has to say what a  
 21 specific defendants did. The fact that you can make a  
 22 plausible claim that four people here have conspired does not  
 23 mean that you have of a plausible claim that 33 others did.

24 MR. ARENSEN: Let's see what we say in the  
 25 complaint.

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1                   THE COURT: Okay.

2                   MR. ARENSEN: I am going to go through some of the  
 3 paragraphs there and see how much detail we actually do  
 4 provide and how much notice we do provide to the defendants.

5                   THE COURT: It's not notice, it's not notice.  
 6 That's not the issue.

7                   I'm talking about plausible claims against the  
 8 plaintiffs, the defendants here who were not, who haven't  
 9 pleaded guilty to anything and who haven't accepted  
 10 responsibility.

11                  I mean, it's just everybody is lumped together  
 12 here, that's one of my fundamental problems here. You take  
 13 from the fact that there's been some proof of a conspiracy, I  
 14 mean more than proof there is acceptance of responsibility of  
 15 a conspiracy and now you're asking the Court to now basically  
 16 involve the entire international air transport industry in an  
 17 anti trust case and I'm having trouble with that.

18                  MR. ARENSEN: I don't think we're involving the  
 19 entire air transport industry first, Your Honor, we only have,  
 20 to give you a round number, 30 defendants. We haven't named  
 21 Turkish Airlines which might be involved; we didn't name Air  
 22 Malaysia which may be involved. So it isn't everybody, there  
 23 actually was some selection involved in this process.

24                  THE COURT: And that's what needs to be in the  
 25 complaint. That's what needs to be in the complaint. What is

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1 the selection mechanism?

2 MR. ARENSEN: When we say the defendants at the end  
3 of 1999 jointly agreed on factors triggering the fuel  
4 surcharge pricing system.

5 THE COURT: Where are you reading from?

6 MR. ARENSEN: I am more or less paraphrasing  
7 Paragraph 87 of the complaint.

8 THE COURT: Okay.

9 MR. ARENSEN: Triggering the fuel surcharge pricing  
10 system, the resulting price change to be implemented by the  
11 occurrence of those factors and the timing of that change.

12 Well, all 30 defendants that we have named  
13 participated in that. Do we have to list all 30 of the  
14 defendants for participating in the changes to the surcharges  
15 that were implemented actually were agreed upon at the end of  
16 1999 for implementation.

17 THE COURT: Don't you have to give each defendant  
18 notice of what they did?

19 MR. ARENSEN: We just did.

20 THE COURT: You're saying that each and every  
21 defendant did the exact same thing?

22 MR. ARENSEN: Yes, that's right. And maybe they all  
23 didn't get around in a room to do it, but with their contacts  
24 around the world they were able to impose a fuel surcharge in  
25 2002. Again, we're being -- the question is when we say when.

1 The defendant, this is Paragraph 90 of the  
2 complaint, Your Honor, "The defendants jointly grieved and  
3 initiated a four-step fuel surcharge increase program where  
4 specific factors would trigger only one step per period and a  
5 five cent which would increase at the fourth step. We allege  
6 because we say defendants, each and every one of them, did it  
7 and if each and every one of them did it, do we have to list  
8 all 30 so they know what it is they did. Isn't this specific  
9 enough?

18 And, in Paragraph 92, we say they jointly  
19 imposed additional multiple step price increases all at  
20 identical amounts per step.

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1 that went back and forth between the defendants?

2 THE COURT: No, of course, not.

3 MR. ARENSEN: Right. So where do you draw the line?

4 THE COURT: I don't know.

5 MR. ARENSEN: Okay.

6 THE COURT: That's what I'm trying to figure out.

7 MR. ARENSEN: That's right.

8 What I suggest if you're supposed to give a  
 9 short and plain explanation under Rule 8(a)(2) do you have to  
 10 say more than there was this agreement in 2002, a four-step  
 11 program, five cents per step, than when they get to the end of  
 12 that. They go around they meet and they agree and they add  
 13 more steps on and that's what we did and that's what we  
 14 allege.

15 They not only did they do that, but we say they  
 16 involved other matters in Paragraph 88, if I can go back? We  
 17 generalize a little bit, but after all, we're trying to give  
 18 notice to the defendants of what they did. Defendants agreed  
 19 on the harmonization of the fuel surcharge, the implementation  
 20 of the fuel surcharge, the extension of the fuel surcharge  
 21 beyond the four steps.

22 Currency issues, Euros and dollars. Capping  
 23 the fuel surcharge by shipment or by weight. And refusing to  
 24 discount the fuel surcharge to freight forwarders.

25 And let me just focus a little bit on that last

1 one. Mr. Sherman said nowhere in that complaint do we tie the  
 2 discounts to the surcharges, right there in Paragraph 88 we  
 3 do.

4 So, how much detail do we have to give? Do we  
 5 have to name each of the 30 defendants who did participate in  
 6 the fuel surcharge overcharges. Do we have to say that Air  
 7 Korea did it? Do we have to say that Qantas did it? Do we  
 8 have to say that Cathay Pacific did it, or is it sufficient to  
 9 say that they did do it, all of them, because they did it do  
 10 because of the differences here between some of the cases that  
 11 the defendants have cited.

12 Here, all the defendants were in the same  
 13 situation and they all applied the surcharge. This is not  
 14 In Re: Elevator where all you've got is general statements.  
 15 We don't have these general statements of the 2002 four-step  
 16 program, 2003, what are we going to do? We're going to add it  
 17 on and continue on at the steps. That, I submit, is  
 18 sufficient specificity.

19 How about the security surcharge?  
 20 Paragraph 97, "Following the September 11th attacks,  
 21 defendants met and jointly agreed to impose a security  
 22 surcharge which remained in effect thereafter." So now they  
 23 know when. "Secret meetings and communications including  
 24 discussions at the highest levels of Re: Respective Companies  
 25 occurred in various venues Europe, United States, and Africa."

1 Well, do we have to say that there were meetings in Nairobi  
2 and Johannesburg and Cairo? Isn't it sufficient to say that  
3 there were meetings in Africa?

4 THE COURT: Why not.

5 MR. ARENSEN: Well, because if you're trying to  
6 plead a complaint that's plausible and to give notice to the  
7 other side do you have to plead that kind of evidentiary  
8 detail? I would be --

9 THE COURT: I guess I'm asking why not give some  
10 evidentiary detail. I'm saying you have to plead every fact.

11 MR. ARENSEN: But we just said --

12 THE COURT: I understand the argument.

13 MR. ARENSEN: I don't mean to cut you off, Your  
14 Honor.

15 There has to be a line, I think you and I at  
16 least agree on that. I assume that the defendant might agree  
17 on that, but I think that would draw very close to let's go to  
18 trial when you actually put all your proof in, that's what you  
19 have to allege.

20 I still think, and the Supreme Court said it in  
21 Twombly, that it is notice pleading regime. Yes, you have to  
22 have more facts if you are pleading an antitrust case to show  
23 that it's plausible. But beyond that, how much more do you  
24 have to have in order to give notice to the defendants. Do  
25 you have to say that they met in Tokyo? Do you have to say a

1 that they met at the Oak Bar over in Manhattan? Isn't it  
 2 sufficient to say they met in United States; they met in  
 3 Africa; they met in Europe. Where do you draw that line?

4 I suggest that we have sufficient facts so  
 5 they're not in any kind of questioning mind as to what it is  
 6 that they did. They know there was a security surcharge that  
 7 was imposed. They know that they had meetings at the highest  
 8 levels, do we have to list every single executive of the  
 9 companies that participated? Can we do that at the outset of  
 10 the case even if you are in a case where you don't have an  
 11 amnesty applicant? Is that really feasible to ask victims of  
 12 an anti trust conspiracy to come in with that kind of detail?  
 13 You'll never get a case beyond a motion to dismiss, that can't  
 14 be right.

15 THE COURT: Well, what about Lufthansa's statement  
 16 that what they said, and I don't recall this, but I'm relying  
 17 on Mr. Sherman, that upon their cooperation it would exonerate  
 18 some of them.

19 MR. ARENSEN: I might disagree with that statement,  
 20 Your Honor.

21 THE COURT: Okay.

22 MR. ARENSEN: Based on our investigation maybe not  
 23 based just solely on what it is that Lufthansa knows.

24 THE COURT: Which suggests, then, that these  
 25 meetings were not great convocations of 37 people or 37

1 companies or how many, I didn't count, them but that there was  
 2 something a little bit less formal than that, right? That's  
 3 probably what happened, if it happened at all, and some more  
 4 evidentiary detail than just a global conspiracy that the  
 5 defendants meet and communicated and jointly agreed, " those  
 6 are all sort of -- they are in the nature of conclusory,  
 7 conclusory assertions as opposed to the sort of.

8 MR. ARENSEN: Your Honor, we didn't just say they  
 9 met and they agreed.

10 THE COURT: No, you're right. You've given at  
 11 least, as to the surcharges, you've given some more detail of  
 12 what they agreed upon. It's a little bit less clear about how  
 13 they claim to do that, I'm assuming that they didn't, you  
 14 know, all gather in Nairobi at one time and sit down and so  
 15 that's part of what's troubling me.

16 MR. ARENSEN: Right. Do we say they met in Africa?  
 17 Do we say they met in the United States? We don't say that.  
 18 We don't say they met in the Oak Bar in Manhattan or they met  
 19 in Europe. We didn't say they met in Istanbul and Frankfurt  
 20 and Paris and Milan.

21 If we did say that, does it not provide them  
 22 any more notice? Is that any more of a factual pleading that  
 23 they have, that we have to, one, demonstrate a claim; and two,  
 24 let them know the scope of what it is they're going to be  
 25 investigating through discovery. I don't think the Supreme

1 Court was saying that in Twombly. I don't think the Second  
 2 Circuit was saying that in Northeastern or in Elevators.

3 THE COURT: Okay.

4 MR. ARENSEN: Okay. Let me go through customs  
 5 surcharge. There's another example.

6 Since beginning in late 2003, this is our  
 7 Paragraph 104. Actually, let me start with 105. Since 2003,  
 8 air freight carriers have been required to prepare and submit  
 9 to U.S. Customs a manifest of all goods that the carrier will  
 10 offload in the United States. The manifest must be received  
 11 by the air freight carrier and then submitted electronically  
 12 to U.S. Customs by the air freight carrier before its airplane  
 13 enters United States airspace.

14 Since 2003, the defendants secretly met,  
 15 communicated, and jointly agreed to charge uniform, flat fees  
 16 to air freight customers for each defendants' preparation of  
 17 manifests in Paragraphs 106. The meetings and discussions  
 18 took place in Europe, Asia, America and elsewhere, not Africa.  
 19 So maybe it didn't happen in Nairobi.

20 Paragraph 4 of 106 defendants concertedl y  
 21 agreed that they would charge €8 per manifest received from  
 22 air freight customer in manual paper, €2 per manual received  
 23 in an electronic format.

24 So now again we did say defendants did that.  
 25 We know that the defendants who were shipping into the States

1 are charging the fees. It's in Euros, it's flat, doesn't seem  
2 to bear any relation to whether it really has to go through  
3 some manual processing or some electronic processing.

11 MR. ARENSEN: I would be happy to.

12 THE COURT: Those are much less detailed, they don't  
13 really provide any detail about, well, I guess the refusing to  
14 discount, it says they refused to discount.

15 MR. ARENSEN: Right.

16 THE COURT: Not with respect to surcharges I mean  
17 which is --

18 MR. ARENSEN: Remember the defendants have conceded  
19 that on the surcharges it's plausible.

20 THE COURT: Right.

21 MR. ARENSEN: The discounts, Paragraph 88, it's  
22 right in there and it links down obviously later on to where  
23 we take them out separately.

24 Let's look at Paragraph 89, Your Honor.

25 THE COURT: I saw that the converted increases in

1 years and the allocation of customers, there's not much detail  
 2 at all about what was even accomplished by that. I mean,  
 3 concertedly agreed to concertedly increase their yield. I  
 4 don't even know what that means. I mean, I guess it --

5 MR. ARENSEN: I think the defendants do know what it  
 6 means, Your Honor.

7 THE COURT: Okay.

8 MR. ARENSEN: And the pleading --

9 THE COURT: Help me.

10 MR. ARENSEN: I'll try, I will step outside the  
 11 complaint and explain if you want, but I think it's implied in  
 12 the complaint. But what yields rely revenue per ton mile.

13 THE COURT: I'm sorry.

14 MR. ARENSEN: Yields are revenue per ton mile.

15 THE COURT: How they jointly agreed increasing  
 16 yields.

17 MR. ARENSEN: The complaint alleges that the data is  
 18 available to all air freight carriers for the industry as a  
 19 whole, that's Paragraph 111. And they, through IATA, they  
 20 don't say IATA, but that's what it is; that's the trade  
 21 association. And in furtherance of their agreement, we allege  
 22 that the defendants privately exchange an individual air  
 23 freight carrier's yields, that's in Paragraph 112.

24 So now they know each others' yields, revenue  
 25 per ton mile, and they can agree that we'll raise the revenue

1 per ton mile on your routes into the United States starting  
 2 now by five percent. How can you do that? There are a  
 3 variety of ways doing that: You can raise the rates, raise  
 4 the fuel surcharges, whatever it is.

5 THE COURT: Then why isn't that pleaded?

6 MR. ARENSEN: Because.

7 THE COURT: I mean, if that's sort of, like, a means  
 8 and methods of this conspiracy, that would give some meat to  
 9 the generalized allegations to these conclusory allegations to  
 10 concertedly increase their yields, I didn't understand what  
 11 this meant. And now I understand what that means, it's still  
 12 generalized. It still doesn't tell me what they did,  
 13 accomplish that purpose.

14 MR. ARENSEN: Let's hypothesize the following  
 15 agreement that two airlines, we'll keep it simple rather than  
 16 30, although I believe that 30 may have been involved.

17 The two airlines say, "Let's increase our  
 18 yields on shipments from Europe to New York by five percent."  
 19 The implementation is up to your local people on the ground,  
 20 we don't care about that, but the point is you and me are  
 21 going to charge our customers by five percent more so that the  
 22 yields go up.

23 THE COURT: But why don't you plead then if that's  
 24 what they did.

25 MR. ARENSEN: I would suggest that is what we pled,

1 because if you take a look at Paragraph 113 call it January 1,  
2 2000, to February 8, 2007, which is the date of the filing in  
3 Brooklyn, the defendants met discussed and jointly agreed to  
4 concertedly increase their yields on air freight shipment  
5 services.

6 It didn't say they this five percent in 2004  
7 and they didn't three percent in 2005 or whatever. I agree  
8 that it doesn't have that kind of detail, but do we need to  
9 have that kind of detail to put them on notice as to what was  
10 going on with the yields.

11 They understand what yields are, we understand  
12 what yield are, Your Honor now understands what yields are,  
13 and if the agreement is let's have it go up five percent, then  
14 that's what we are saying.

15 THE COURT: The same problem with the increase --  
16 the allocation of customers.

17 MR. ARENSEN: Paragraph 114 on that one, Your Honor.

18 THE COURT: Yes.

19 MR. ARENSEN: Because what it says is, "During the  
20 time from January 1, 2000, through February 8, 2007," which is  
21 the date for the complaint, "defendants met communicated and  
22 jointly agreed to increase maintain or stabilize air freight  
23 shipping services prices by allocating their customers where  
24 necessary in order to minimize a customer's ability to access  
25 competitive rates."

1                   So we're only talking about a certain aspect of  
 2 customer allocation. It's not that the defendants sat down in  
 3 a room and said, "This particular freight forwarder," Airm,  
 4 which is one the plaintiffs, "will be Lufthansa's freight  
 5 forwarder," and the rest of us Korean Air, Air France will not  
 6 be doing that.

7                   We are saying that where there was a problem  
 8 then perhaps the air freight customer had enough business that  
 9 could effect the competitive rates could get a negotiation  
 10 going. The defendants agreed in that situation that they were  
 11 going to minimize the customer's ability to access competitive  
 12 rates.

13                  THE COURT: Why isn't that pleaded with a little bit  
 14 more specificity as to how this was done? I mean this is --  
 15 these are very generalized. I think I know the answer, the  
 16 answer is going to be, "Well, how much do we have to do?"

17                  MR. ARENSEN: Let me just say this. If, in fact,  
 18 you suggest that we haven't pled it with enough specificity,  
 19 contrary to what Mr. Sherman said, I think we should be given  
 20 an opportunity to put those facts into an amended complaint.

21                  THE COURT: Okay. Thank you, Mr. Arensen. Let me  
 22 give Mr. Sherman a brief chance to respond.

23                  I am primarily concerned with the surcharge  
 24 allegations and I will go back to asking the question I asked  
 25 you at the outset since Mr. Arensen now sees that increased

1 when they say, "defendants," they mean the defendants met and  
 2 agreed. They did all meet in one place, they met and agreed.  
 3 Indeed, they mean that every single one of the defendants were  
 4 involved in this.

5 Well how much more detail is required with  
 6 respect to the surcharges, since there's a fair amount of  
 7 detail as to the amounts of surcharges when they came into  
 8 being roughly, and so how much more do they have to plead for  
 9 that?

10 MR. SHERMAN: Well, Your Honor, first let me say it  
 11 is interesting because Mr. Arenson, in describing what they  
 12 allegedly pleaded, added facts to virtually everything he  
 13 described. He purported to read to you Paragraphs 113 and  
 14 114, but he didn't read the paragraphs, he added a timeframe.

15 THE COURT: That's not the surcharges.  
 16 Paragraphs 113 and 114 have to do with a non-surcharge  
 17 allegation, that's what I'm asking about here.

18 MR. SHERMAN: Fair enough, Your Honor.

19 With regard to the surcharges, again, their own  
 20 complaint believes the allegation that all defendants were  
 21 involved. They say it in places it was applied unevenly. If  
 22 it is indeed their allegation that all defendants met in  
 23 Africa on a particular date, then it ought to be in the  
 24 complaint. All defendants met in Africa on this date to  
 25 discuss X.

1                   THE COURT: So, you would say they do have to  
 2 describe with some specificity the meetings that occurred.

3                   ARGUMENT II

4                   MR. SHERMAN

5                   MR. SHERMAN: With some specificity, yes, Your  
 6 Honor. There needs to be some factual matter and it --

7                   THE COURT: Where is that? Let me ask you what  
 8 authority is there for that?

9                   MR. SHERMAN: Again, I think it's directly out of  
 10 Twombly and out of In Re: Elevator and it sounded to me like  
 11 Mr. Arenson was reading from In Re: Elevator.

12                  In going through the paragraphs in describing  
 13 what they allege, it's extremely similar to the allegations in  
 14 In Re: Elevator. And, again, it's not simply is it  
 15 plausible, is it alleged as to all the defendants here, and  
 16 that's exactly what the Second Circuit hit on in saying the  
 17 list is entirely, entirely in general terms without any  
 18 specification of particular activities by any particular  
 19 defendant.

20                  Now, why is it you raise a number of times with  
 21 Mr. Arenson why isn't it pleaded in there? Well, he said, We  
 22 shouldn't have to well why it is given the amount of time  
 23 given the fact that they have had access to Lufthansa's  
 24 materials. Why is it that plaintiffs haven't amended their  
 25 complaint, haven't sought to amend their complaint to add the

1 sort of details and Mr. Arenson just stood here and told you.

2 Well, Your Honor, I suggest that the reason is  
 3 because if they added the specifics and pleaded with the  
 4 specificity required by Twombly in the Second Circuit it would  
 5 show that indeed all defendants did not meet in Nairobi or  
 6 wherever any particular time; that, in fact, they don't have a  
 7 basis for alleging a worldwide conspiracy with respect to  
 8 surcharges or anything else.

9 That's exactly why the Supreme Court and the  
 10 Second Circuit require factual matter and not just a  
 11 generalities. Defendants are no longer required to respond to  
 12 generalities, and indeed, I respectfully disagree with  
 13 Mr. Arenson. It's true that the Supreme Court did not do away  
 14 with the notice pleading of §8(a) but to suggest that Twombly  
 15 effected in change in the pleading requirements.

16 I understand that plaintiffs want to believe  
 17 that, but it's simply not the case in retiring the Connolly v.  
 18 Gibson "No Set of Facts" language, the Supreme Court made it  
 19 pretty clear that what plaintiffs have been doing for years is  
 20 what plaintiffs attempt to do here: Make general allegations  
 21 and say, well, you could conceive of a set of facts. We  
 22 couldn't prove which would tie this up and it is no longer any  
 23 good under the Supreme Court. You got to show your cards now  
 24 or you got to fold, and plaintiffs haven't done it here and  
 25 it's clear they haven't done it just by what Mr. Arenson told

Argument III - Mr. Lovel I

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1 you.

2 THE COURT: Okay.

3 MR. SHERMAN: Unless you have other questions.

4 THE COURT: No, I think you answered the question.

5 Let's move to the preemption.

6 I am going to shift the order of argument  
7 because, frankly, the decision by the Supreme Court recently,  
8 and I guess it was a more recent Second Circuit case, poses a  
9 substantial hurdle. It seems to me for the argument, that for  
10 one branch of the ADA Preemption argument that the plaintiffs  
11 have made and I'm not terribly persuaded by the distinction  
12 drawn between foreign carriers and air carriers; and I think  
13 it's best if I left why they're preempted first with the frank  
14 pronouncement acknowledged by the Court that the Court is  
15 really troubled by. I think the defendants have a pretty  
16 strong argument here. So, is it Mr. Lovel I?

17 ARGUMENT III

18 BY MR. LOVELL

19 MR. LOVELL: Yes, Your Honor. We do have a slide  
20 presentation. I would like to get right at this foreign air  
21 carrier/air carrier issue. I think that's the new ground for  
22 Your Honor in this case.

23 In 1938, Congress enacted the Federal Aviation  
24 Act. It has a slightly different title which we'll get it up  
25 in a second in 1938. From 1938 forward, Your Honor, Congress

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1 defined foreign air carrier and air carrier mutually  
 2 exclusively. Foreign air carriers have to be from somewhere  
 3 else; air carriers have to be from the United States. Foreign  
 4 air carriers cannot do domestic flights. Air carriers,  
 5 depending on their certificate or exemption can. That was  
 6 carried forward for 40 years with no preemption provision, no  
 7 express preemption provision in the statute.

8 In 1978, Congress enacted the ADA.

9 Can you get slide three up there?

10 Let me keep going, Judge. If we ever get it up  
 11 we'll discuss it. I think we can lay it, it's clear to me  
 12 anyway.

13 In 1978 --

14 THE COURT: I'm listening, but I don't want you to  
 15 feel distracted. I'm perfectly willing to wait for a second  
 16 if you're close.

17 MR. LOVELL: In 1978, The Airline Deregulation Act  
 18 was enacted. It carried forward the same statutory  
 19 distinctions between air carrier and foreign air carrier, two  
 20 entirely different terms and two entirely different functions,  
 21 so they're different persons with different functions.

22 Next slide.

23 Now, in the Airline Deregulation Act, Your  
 24 Honor, Congress deregulated domestic airlines. It did not  
 25 deregulate foreign airlines, only the domestic airline

## Argument III - Mr. Lovel I

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1 industry was deregulated.

2 Go to the next slide.

3 Now, in the ADA, for the first time, Congress  
4 inserted a preemption provision into the federal aviation  
5 legislation, and as the Supreme Court has said, and as  
6 Congress said, the purpose of the preemption provision was to  
7 protect the deregulation of domestic aviation from regulation  
8 by the states and those are our cities.

9 Go to the next one.

10 So, we come to the language of the provision at  
11 issue. The provision was enacted in the ADA in '78; there's a  
12 one word amendment. In '84, and defendants said there was no  
13 change by the '94 amendment, so we're looking with the  
14 exception of one word which we'll come to that way and Your  
15 Honor has to decide.

16 "...no state...shall enact, enforce any law,"  
17 et cetera, "of any air carrier having authority under  
18 subchapter IV of this chapter to provide interstate air  
19 transportation."

20 Each of these terms is a defined term. First  
21 of all, an air carrier -- if you go back to slide two -- air  
22 carrier has never been a shorthand term in the statutory law  
23 of the Federal Government for air carrier and foreign air  
24 carrier. Air carrier has always been used in every provision  
25 except for one or two exceptions where it couldn't mean just

## Argument III - Mr. Lovel I

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1 air carrier as air carriers are domestic entities.

2 Li kewise, when Congress wants to include both  
 3 air carrier and foreign air carrier with the benefits or  
 4 burdens of a provision, Congress invariably uses both terms.

5 Okay let's go back.

6 Next one.

7 Next one.

8 Now, in this Circuit, there is a binding  
 9 decision the U.S. v. Keuylian on what the Federal Aviation Act  
 10 is doing when it uses "air carrier" and "foreign air carrier."  
 11 U.S. v. Keuylian says they are mutually exclusive terms. This  
 12 mutual exclusivity are upset in subsequent Second Circuit  
 13 cases or any subsequent court in the Second Circuit.

14 On the contrary, the foreign air carriers --  
 15 this is the third bullet up there -- have used the  
 16 distinctions over and over to get the benefit of complying  
 17 with the figures in the FAA that says this applies to an air  
 18 carrier and there is no case that goes against it in this  
 19 circuit.

20 I would say Your Honor is almost bound when you  
 21 see the words "air carrier" in the FAA. It means air carriers  
 22 and it does not include foreign air carriers going back to the  
 23 preemption provision.

24 Back the other way.

25 So, Judge, if Congress wanted to include

1 foreign air carriers who couldn't provide the benefits of  
2 deregulation as they couldn't operate domestically, but if  
3 Congress wanted to put them into the express preemption they  
4 would have said, as they say in all the other sections, air  
5 carrier and foreign air carrier; Congress didn't do that.

6 Now, in air carrier, an air carrier is not  
7 someone who has received a certificate or an exemption. An  
8 air carrier is anybody who is acting. So, if you haven't  
9 received a certificate or an exemption you're still an air  
10 carrier. If you're flying and all of these are  
11 prosecutions -- they're in our first brief, Your Honor.

12 THE COURT: Yes.

13 MR. LOVELL: Of people who were air carriers but  
14 they hadn't been authorized yet.

15 Now they do not get the benefit of preemption?

16 Let's go to the next slide.

17 By the original language, we looked at the  
18 language under subchapter IV. You don't have preemption  
19 benefits until you have from the federal government either a  
20 certificate or an exemption.

21 Now, this Hughes case had to confront the  
22 following question. Is an exemption good enough to qualify  
23 for preemption? Do you need to get a certificate; and they  
24 said "having authority to" means both either a certificate or  
25 an exemption.

1 Let's go to the next one.

2 The Civil Aeronautics Board in 1979 came up  
3 with the "Walter Alston Rule." It was a final rule, but it  
4 was called an interim policy and what it was an interpretation  
5 of this preemption provision and some other things.

6 As we said in each of the bullets here, Judge,  
7 the Civil Aeronautics Board's binding interpretation of the  
8 preemption provision is that either an exemption or a  
9 certificate will entitle you to preemption but not until you  
10 obtain it.

11 So, if we go back to the original language,  
12 preemption is limited to air carriers; and moreover, it's  
13 limited to air carriers who have actually gotten the  
14 certificate or got the exemption.

15 And, so, this -- it's in the last bullet --  
16 this 1979 interpretation completely agrees with plaintiffs'  
17 interpretation in the statute. We did not put in cases on  
18 deference which Your Honor is probably familiar with now.

19 Let's go to the next one.

20 Now, the third clause that was up there  
21 originally in the statute is interstate air transportation.  
22 It's an air carrier having authority to conduct interstate air  
23 transportation. That's the first bullet; this is the  
24 congressional definition. It's between states or territories,  
25 overseas transportation. The second definition is another

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1 part of domestic air transportation, but it involves  
2 territories or possessions the way it says, Your Honor.

3 THE COURT: Mm-hmm.

4 MR. LOVELL: So, a foreign air carrier is not an air  
5 carrier. But also a foreign air carrier can't provide  
6 interstate air transportation. A foreign air carrier can only  
7 get a permit for foreign -- the third bullet -- for foreign  
8 air transportation.

9 So, Congress has excluded foreign air carriers  
10 from the preemption, from the expressed preemption provision  
11 in this case.

12 Okay, let's go to the next one.

13 The summary of the 1978 preemption provision is  
14 limited only to air carriers who have received their  
15 certificate or been exempt to provide interstate air  
16 transportation. Deregulation was extended to overseas air  
17 transportation but preemption did not. Preemption was not  
18 given to those air carriers who had a certificate to engage in  
19 overseas air transportation in the '78 statute.

20 Okay, let's go to the next one.

21 Let's skip that, let's come back to the next  
22 one.

23 Now we go to the next statute.

24 In 1984, The Civil Aeronautics Board Sunset Act  
25 of 1984. The CAB is going out of business, they did a good

1 job, they got things deregulated, and was renamed the  
 2 Department of Transportation. The Department of  
 3 Transportation is going to take over and is going to run the  
 4 airways and other things, too.

5 In '84 they have the legislative history. This  
 6 legislative history confirms what was said by Congress in '78  
 7 and the Supreme Court decision on deregulation was centered  
 8 only included, not centered on, only included domestic  
 9 aviation.

10 The second bullet.

11 Hearings for the '84 act have led the committee  
 12 to conclude that deregulation has generally been successful  
 13 and that there should be no change in the major reform of the  
 14 ADA, the deregulation of domestic air carrier routes and  
 15 rates. It says before they were phased in at different times.

16 And the third bullet.

17 This act clarifies and completes the program  
 18 established in with this [8] for the deregulation of domestic  
 19 aviation.

20 I'm sorry for repeating myself, Your Honor.

21 The foreign air carriers couldn't do domestic  
 22 aviation. They couldn't do anything that this act was  
 23 clarifying and completing.

24 Let's go.

25 In 1984, there was a one-word amendment to the

1 preemption provision. The word "interstate" in this third  
 2 clause where we put the bracket in, the third bracket up  
 3 there, was deleted. So, now it says, "Any air carrier having  
 4 authority under subchapter IV of this chapter to provide air  
 5 transportation no longer is it limited to interstate."

6 Let's go to the next one.

7 The legislative history shows no intent to  
 8 include foreign air carriers within preemption. First of all,  
 9 they still can't do domestic. Second of all, the House bill  
 10 states, this is the very scant legislative history, and I  
 11 would say it's not as clear as it could be, but a lot of times  
 12 that's the way it is with Congress.

13 Things are not as clear as it could be and  
 14 that's a big part of what you do, Your Honor, and there's a  
 15 gap between what was intended in the language a little bit, or  
 16 it's not totally a map, and here they have it in Section 9 of  
 17 the House bill makes an amendment to conform the regulatory  
 18 format in the FAA to interstate and overseas cargo with the  
 19 regulatory format, et cetera.

20 Next bullet.

21 Deletion of "interstate" was necessary to all  
 22 carriers having authority in the air carriers having authority  
 23 to provide interstate were entitled to preemption. This  
 24 picked up the air carriers who did overseas air cargo and also  
 25 it subjected anybody in the domestic airline industry to the

1 rigors of competition and it gave them the benefit of  
2 preemption.

3 The 1994 amendments. This is the last  
4 amendment that has been made, this statute hasn't been amended  
5 since then. The 1994 amendment to the preemption provision,  
6 defendants assert, has no substantive change. The amendment  
7 was made to read as follows and they took out "having  
8 authority" to "may provide" in what we say in our brief in a  
9 different section of the FAA, "may provide" has been  
10 interpreted to mean "having authority."

11 So, the defendants are in essence right, and  
12 through all of these statutory changes, the Congress has  
13 carried forward the mutual exclusivity of air carriers and  
14 foreign air carriers? The definition and the mutual  
15 exclusivity are in the function. So, still, if you're going  
16 to provide the domestic aviation education benefits of  
17 deregulation, you have to be an air carrier and you have to be  
18 one with authority that may provide transportation under this  
19 subpart.

20 Okay, go to the next one.

21 Now, we say, Your Honor, that there's only one  
22 way this statute can be read and that applies to a preemption;  
23 express preemption applies to a subset of air carriers. We  
24 don't have the burden to show that it can only be read that  
25 way. If the preemption standards mean anything, strong

1 preemption, strong presumption against preemption.

2 THE COURT: Didn't the Supreme Court say exactly the  
 3 opposite here? The Supreme Court just basically said, no,  
 4 whatever may apply to other preemption arguments. The ADA  
 5 Preemption was meant to be read broadly --

6 MR. LOVELL: Yes, I agree with Your Honor that the  
 7 phrase, there's two different issues. There's the  
 8 jurisprudential issue, but that's probably the adjective for  
 9 what happens with Your Honor is confronted within a motion or  
 10 what standards you use and then what does the language mean.

11 Yes, the Supreme Court says the language is  
 12 broad, you have to look at the words. Second, when you then  
 13 look at the words this standard has not been thrown out.

14 The defendants' statement that it's a broad  
 15 statute is correct. However, in this Circuit under  
 16 Abdu-Brisson and other cases you look at, you look at under  
 17 the same Supreme Court said, "The strong presumption under  
 18 preemption."

19 THE COURT: I'm just not gathering the distinction  
 20 you're making. On one hand, the Supreme Court has said,  
 21 "broadly." Now, you say you read it broadly and you read it  
 22 narrowly. I don't know how I can harmonize those two  
 23 concepts.

24 MR. LOVELL: I agree. I'm not saying it very well,  
 25 but I think the distinction is this for any statute Your Honor

1 is confronted with there is a strong presumption against  
 2 preemption. The burden is on the movant in express preemption  
 3 provisions are narrowly construed all of that jurisprudentia  
 4 law applies.

5 As far as the judicial tests all apply. But  
 6 the Supreme Court has told you this is a broad provision,  
 7 okay? I'm going to still put it through the same judicial  
 8 hopper but I know when it's going in it's a broad provision.

9 THE COURT: Okay.

10 MR. LOVELL: I hope that's good.

11 THE COURT: I better understand the argument let me  
 12 put it that way.

13 MR. LOVELL: Thank you, Your Honor.

14 Next slide.

15 Now, this was not changed by the recent  
 16 decisions we say, Your Honor, and we say in this Circuit it  
 17 remains good law. The defendants, from their opening brief,  
 18 have argued it. Abdu-Brisson held at the motion to dismiss  
 19 stage Delta could not overcome its initial presumption of  
 20 preemption by establishing that the purpose of the state law  
 21 could be frustrated. In the recent Supreme Court case, it  
 22 says at least this has to be shown. It does not say that  
 23 something more has to be shown.

24 Let's go to the next one, all right.

25 So here's the plaintiffs' versus defendants'

1 interpretation. This is all addressed to foreign air carrier,  
 2 air carrier.

3 The first bullet on the left is our view that  
 4 is does not change the use and meaning of virtually the same  
 5 language when the provision was amended in '84. I think even  
 6 the defendants will concede if Your Honor will ask them when  
 7 they stand up that the '78 statute was limited to air carriers  
 8 and that there is no way that they could have been included in  
 9 that. They will concede that, I believe.

10 Now, the burden is on them to say in '84 when  
 11 one word is taken out that Congress intended through that one  
 12 word to explode this preemption provision that has been  
 13 limited to domestic aviation and make it worldwide and bring  
 14 in all foreign air carriers when all the legislative history  
 15 shows you have the opposite.

16 In the selected bullet we agree with the CAB  
 17 policy --

18 THE COURT: What was the reason? You're talking  
 19 about the elimination of the word "interstate."

20 MR. LOVELL: I can tell you one reason for sure, and  
 21 I think it's of a sufficient reason, because overseas people  
 22 were overseas air cargo, the definitions that we went through.

23 THE COURT: Foreign? There was three classes of  
 24 transportation: Interstate --

25 MR. LOVELL: We'll get to the definitions. Here it

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1 is, Your Honor.

2 THE COURT: Yes.

3 MR. LOVELL: Interstate.

4 THE COURT: So there's four definitions. If we're  
5 going to go by definitions, it's the last definition that now  
6 would apply, right? They took out interstate and made it  
7 applicable to all air transportation.

8 MR. LOVELL: Yes, Your Honor, they didn't change the  
9 words "air carrier."

10 THE COURT: No. I mean, that's the tricky part. I  
11 don't disagree.

12 MR. LOVELL: Okay; all right.

13 If you're coming from where I'm coming from,  
14 the Second Circuit law and the statutory definitions and  
15 everything, air carrier means air carrier.

16 Get the other sections of law up there where  
17 they -- where Congress uses both air carrier and foreign air  
18 carrier.

19 If you turn to the '84 amendment, Your Honor,  
20 they had created a preemption provision that didn't do what  
21 they said they were doing. Congress said, "We are going to  
22 protect from regulation that which we've deregulated." It  
23 does not protect deregulation over air carriers who had  
24 overseas transport, they took that out; and in doing that,  
25 they then protected all air carriers.

1 Now, our brief is also full of these other  
 2 provisions.

3 THE COURT: I didn't follow what you just said. But  
 4 one thing that it seems to me is a canon of statutory  
 5 construction is that you look at the language of the statute  
 6 and that legislative intent informs that only when the  
 7 language of the statute is not clear and ambiguous.

8 MR. LOVELL: Plaintiff totally agrees.

9 THE COURT: It seems that most of your argument is  
 10 fixed on legislative intent when legislative intent is not  
 11 where I should be focusing my and, in fact, I would suggest  
 12 that the current Supreme Court has even furthered, sort of  
 13 derided the reliance on the legislative intent.

14 MR. LOVELL: I agree with Your Honor on that, too,  
 15 and Justice Stevens is a great proponent of mock preemption  
 16 would not go along with Justice Ginsburg in the recent trilogy  
 17 and said she's right on the legislative history, Congress  
 18 didn't intend that, but we have too many authoriti es.

19 There is a hierarchy if you look at the words  
 20 first. If the words are clear and consistent if anything is  
 21 clear, if the legislative history, the structure of the  
 22 statute, in fact, the structure may be part of -- I think is  
 23 part of the way Lexicon and some other cases go to look at the  
 24 words does not mean, "Just look at the words of the section  
 25 that you are interpreting," you also have to look at the whole

1 statute: The definition, how the terms are used in other  
 2 parts of the statute that is looking at the statutory words  
 3 albeit where you go first. You don't go beyond that if the  
 4 words are clear, let's go back to the preemption.

5 THE COURT: Your argument really focuses on whether  
 6 air carrier means something more than that original definition  
 7 of air carrier.

8 MR. LOVELL: And our argument is that it can. Go  
 9 back to the only preemption. I think it's seven.

10 Here it is, Your Honor. We think it's over of  
 11 the -- given that for 40 years before and 30 years since air  
 12 carrier and foreign air carrier are mutually exclusive in the  
 13 Keulian case says that and the Second Circuit says they're  
 14 mutually exclusive. It would not mean anything if you look at  
 15 the language and look at the air word "carrier."

16 The shorthand for air carrier and foreign air  
 17 carrier never, in all of the sections of the law, if they mean  
 18 foreign air carrier they bring it in. There's one section  
 19 that says, "Air carrier holding a permit."

20 Now, you have Hobson's Choice, I don't know who  
 21 Hobson was. A permit can only go to a foreign air carrier and  
 22 so statutorily defined as air carrier and you have a permit  
 23 and that's the one section that the defendants cite in their  
 24 brief and they're right.

25 There, you know, they have this principle and

1 we totally agree with you the word is superfluous and they're  
 2 going to add a superfluous word. Even if carrier is defined,  
 3 if the statute is going to be off or a permit is going to be  
 4 off.

5 So, the only way it can be there -- or not off  
 6 -- the matter of reading is Congress slipped, as it slips from  
 7 time to time, in the cases we see when it left out overseas in  
 8 the language. But when you look at this language, here it  
 9 couldn't be clearer; air carrier just means air carriers.

10 Now, if you want to read the other clauses they  
 11 further tie it down to air carrier, interstate air  
 12 transportation. Now --

13 If you go to '84, to the current statute, all  
 14 that they did is take out the word "interstate," Your Honor,  
 15 so it's any air carrier having authority you have to get the  
 16 exemption or certificate for air transportation which brings  
 17 in the overseas. It breaks in the whole U.S. air carrier  
 18 airline industry who Congress wants to be subject to the  
 19 benefits of competition. The plain language of the statute  
 20 couldn't, I submit, Your Honor, I know I'm -- it couldn't get  
 21 any clearer. Air carrier.

22 Now, what are we going to do, explode air  
 23 carrier and say this one time they meant shorthand, no way.

24 THE COURT: Okay. I understand the argument. Okay,  
 25 let me let the defendants respond or the movants respond.

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1 Mr. Sherman again.

2 ARGUMENT III

3 BY MR. SHERMAN

4 MR. SHERMAN: Sorry, Your Honor.

5 THE COURT: You have whistles and bells this time?

6 MR. SHERMAN: Still no whistles and bells.

7 Your Honor, I must confess that I was trying to  
8 keep up with Mr. Lovell. I had a problem.

9 THE COURT: Here's -- he says that the Federal  
10 Aviation Act of which the ADA is part of it as I understand.

11 MR. SHERMAN: Yes.

12 THE COURT: It defines foreign air carriers and air  
13 carriers separately.

14 MR. SHERMAN: I am prepared to address that.

15 THE COURT: That's my most fundamental question.

16 MR. SHERMAN: I understand that and there are a  
17 couple of problems with the indirect plaintiffs' argument on  
18 that. The first problem is that no Court has ever accepted  
19 that their interpretation.

20 THE COURT: Only one court really addressed, as I  
21 recall, was that the Lawal court and the Supreme Court sort of  
22 wasn't asked but addressed it but didn't it's -- if it didn't  
23 apply --

24 MR. SHERMAN: It was specifically raised in the  
25 Supreme Court in the Morales case.

1                   THE COURT: But not decided.

2                   MR. SHERMAN: Well, in finding preemption as to all  
3  airlines there --

4                   THE COURT: Okay.

5                   MR. SHERMAN: -- the Supreme Court certainly decided  
6  it, decided sub silentio, but there was no question that it  
7  was raised in the Supreme Court. There was a jurisdictional  
8  question that can't be waived and, therefore, the Court's  
9  decision has to have rejected the argument with respect to the  
10 foreign carrier.

11                  Admittedly, in the opinion they don't address  
12 it, but they could not have come to the decision that they  
13 came to if you accept the plaintiffs' reading.

14                  Now Lawal court in the same year, 1992,  
15 expressly addressed the argument that they made and rejected  
16 it. And rejected it for the very reason that Your Honor  
17 brought up which is that the Court found that the language of  
18 the statute is unambiguous and no need to go to the  
19 legislative history when the statute is unambiguous.

20                  THE COURT: Why did they not go to definitions in  
21 the statute, that's what I'm --

22                  MR. SHERMAN: Your Honor, the problem with the  
23 plaintiffs' argument that what they want you to do is to stop  
24 reading at words "air carrier." That's not what the  
25 preemption statute says. The preemption statute says --

1                   THE COURT: I know, but I understand the argument  
 2 that follows from there. You're saying it's air carrier has  
 3 further defined --

4                   MR. SHERMAN: Exactly. Exactly.

5                   It's air carrier, a state as a political  
 6 subdivision of a state may not enact or enforce a law or  
 7 regulation or provision related to a price route or service of  
 8 an air carrier that may provide air transportation under this  
 9 subpart.

10                  Now, if they had stopped at air carrier, we  
 11 might have a different case, but the words "that may provide  
 12 air transportation under this subpart," well, we need to look  
 13 at that. It's subpart II that they refer to. Subpart II  
 14 governs economic regulation of both U.S. and foreign air  
 15 carriers.

16                  The subpart includes Section 41302 which  
 17 authorizes DOT to grant permits to foreign air carriers. The  
 18 term "air transportation" clearly includes foreign air  
 19 transportation and foreign air carriers. So, you can't stop  
 20 with the word air carrier, you read the term in the context of  
 21 the statute.

22                  Mr. Lovell admitted he said, well, once or  
 23 twice they actually used the term "air carrier" and it doesn't  
 24 mean just domestic. Well, that's right, and they do that in  
 25 other circumstances where the context of the language

1 application to clear that, it can't be simply a domestic  
 2 carrier. 49 U.S.C. 44901(h)(1) talks about an air carrier  
 3 providing air transportation under a certificate issued under  
 4 Section 411102 which is a U.S. carrier or a permit issued  
 5 under Section 41302 which is a foreign air carrier.

6 THE COURT: Wait, back up on that. I wasn't  
 7 following that entirely.

8 MR. SHERMAN: This is section 49 U.S.C.  
 9 Section 44901.

10 THE COURT: Subpart IV.

11 MR. SHERMAN: This is the section that Mr. Lovell  
 12 was referring to when Congress has included the words "air  
 13 carrier" but then distinguished and included both carriers who  
 14 get certificates that U.S. carriers and carriers who get  
 15 permits which is foreign carriers. So, clearly, there is at  
 16 least one other instance where looking at the content on you  
 17 realize that what it means here.

18 THE COURT: Okay.

19 MR. SHERMAN: There's also the case which we cited  
 20 to you of South African Airways v. Dole which is an '87 case  
 21 by the D.C. circuit. There is a case where the Anti-Apartheid  
 22 Act directed revocation of the right of any air carrier  
 23 designated by the Government of South Africa and a case was  
 24 brought when the rights were revoked and the airline came in  
 25 and said, "Well, wait a minute, any carrier designated by the

## Argument III - Mr. Sherman

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1 government of South Africa has to mean a U.S. carrier," and  
 2 the D.C. Circuit said it's ridiculous.

3 Obviously, Congress didn't mean to allow the  
 4 government of South Africa to designate a U.S. air carrier.  
 5 You have to look at the context to discover what the words  
 6 actually mean.

7 Now, as I said, Lawal is the only case that  
 8 specifically addresses plaintiffs' contentions and rejects  
 9 them because Lawal did just that. Lawal looked at the full  
 10 language of the paragraph. The Court in Lawal said -- if you  
 11 look at the full language -- it's unambiguous. So, you got  
 12 Lawal, you got Morales which is a Supreme Court case, and then  
 13 you got a number of decisions over the years which have  
 14 applied preemption to foreign carriers even if not expressly  
 15 going through the analysis that the Lawal court went through.  
 16 But, to be clear, if this court accepted plaintiffs' argument  
 17 and didn't apply preemption to foreign carriers, you would be  
 18 the first court ever to do that. And verify that the  
 19 preemption provisions do not apply to foreign carriers and the  
 20 Court started by asking Mr. Lovell about recent cases. The  
 21 recent Rowe case and the recent Cuomo decision in the Second  
 22 Circuit. Mr. Lovell didn't address it but I would like to  
 23 address it.

24 THE COURT: That goes to a different part of the  
 25 argument.

1                   MR. SHERMAN: The Cuomo decision didn't. The point  
2 Mr. Lovell made in that they both confirmed that whatever he  
3 says about the general presumption about preemption, it's  
4 clear that the Supreme Court has said this ADA Preemption is  
5 to be construed broadly. Rowe confirmed that the Cuomo case  
6 followed that and reemphasized that but the Cuomo case this  
7 was The Passenger Bill of Rights which I'm sure the Court is  
8 aware of. The Passenger Bill of Rights Act was passed because  
9 of the stories about people being stuck on planes for hours on  
10 the tarmac and in deciding that the act was preempted clearly.

11                   The Act applied to foreign airlines as well as  
12 domestic airlines. The Second Circuit didn't say, "Well, wait  
13 a minute. We're only going to apply this to domestic  
14 airlines." The Second Circuit, again, a case not expressly  
15 addressing it but another case where, in overturning the  
16 statute because it's preempted the Court, included foreign  
17 carriers within the decision.

18                   (Continued on the next page.)

19  
20  
21  
22  
23  
24  
25

1 ARGUMENT III (continued)

2 BY MR. SHERMAN:

3 MR. SHERMAN: Just to go briefly to a couple of  
 4 points that Mr. Lovell made.

5 His claim that Abdu-Brisson says in the Second  
 6 Circuit that the statute must frustrate of purpose of the ADA,  
 7 this is another thing that Rowe speaks directly to. This is a  
 8 recent Supreme Court decision. And it doesn't say the  
 9 qualified language, as suggested by Mr. Lovell. It says this:  
 10 "In respect to preemption" -- this is a quote. "In respect to  
 11 preemption, it makes no difference whether a state law is  
 12 consistent or inconsistent with the Federal regulation."

13 Mr. Lovell spent a lot of time sort of bouncing  
 14 around the legislative history. I do want to correct one  
 15 thing that he says of our argument. We don't say that neither  
 16 the 1984 nor the 1994 statute, change in the statute affected  
 17 any substantive difference. We say that only about 1994. And  
 18 we don't say it. It was said in the statute, and reiterated  
 19 by the Supreme Court in their, in the decision, the Wolens  
 20 decision.

21 The 1984, as you noted and as he admitted, affected  
 22 a pretty big change. It took out the word "interstate" and it  
 23 left the word "foreign commerce," or it left the rest of the  
 24 terms that include foreign carriers and foreign commerce.  
 25 There's nothing in the legislative history to suggest why, but

1 it's out.

2 And the statute that we're dealing with now is the  
 3 statute with the provision that has -- if you read the whole  
 4 language of that paragraph clearly in context, does not stop  
 5 with the word air carrier, and Abdu-Brisson was the proper  
 6 analysis of it.

7 THE COURT: I'm sorry, I didn't follow you. You say  
 8 Abdu-Brisson is the proper analysis?

9 MR. SHERMAN: I'm sorry, I used the wrong case.  
 10 Lawal is the proper analysis. Abdu-Brisson was the wrong  
 11 analysis.

12 You know, again, Your Honor, we agree with you --  
 13 I'm sorry. The case of Culian, Mr. Lovell raised and  
 14 suggested that this is a Second Circuit authority that you  
 15 must follow on air carrier versus foreign air carrier. Not at  
 16 all.

17 Culian was a case about a criminal prosecution of an  
 18 individual for bringing firearms onto a plane. And that  
 19 decision looked at an entirely separate provision in making  
 20 the point about carrier versus air carrier. We don't deny --

21 THE COURT: Air carrier versus foreign air carrier.

22 MR. SHERMAN: Air carrier versus foreign air  
 23 carrier, yes.

24 We don't contest that, as a general matter, those  
 25 two provisions are set out separately in the statute. But

1 they can't cite -- there are no cases, which examine the term  
 2 in the preemption provision and come to the conclusion that  
 3 they want to come to.

4 THE COURT: Well, but the interesting part of the  
 5 argument, though, is that you are saying that I should look at  
 6 the deletion of interstate from air transportation and rely on  
 7 the statutory definition of air transportation in interpreting  
 8 that portion.

9 MR. SHERMAN: I'm just noting that it's out. So  
 10 that the statute that we're dealing with now is, I mean, I'm  
 11 not sure why it matters that he went back to the original  
 12 1978, when in 1984 the words were taken out. The statute as  
 13 it stands today doesn't have that --

14 THE COURT: Right, but what I'm saying is that the  
 15 phrase "air transportation," what does that mean? You're not  
 16 relying on the broader definition of air transportation as set  
 17 out in the FAA, which was up there. You're just saying  
 18 whatever it means, it means. And the fact that they took out  
 19 interstate means it must be broader than just interstate air  
 20 transportation.

21 MR. SHERMAN: Exactly. Exactly.

22 And Your Honor, the fact that, let's accept  
 23 Mr. Lovell's argument for a minute, although I don't think you  
 24 need to go to legislative history.

25 The fact that Congress in 1978 may have been focused

1 on domestic deregulation does not say anything in the absence  
 2 of a specific statutory prohibition against applying this to  
 3 foreign carriers. It doesn't say anything about whether it  
 4 ought to be applied.

5 The preemption provision is clear, if you read it in  
 6 its entirety. And every case that's examined it, every court  
 7 that's examined it, has held that it applies to foreign  
 8 carriers. I suggest that this court should do the same.

9 THE COURT: Okay. Thank you.

10 Mr. Lovell? There you are. I'll give you, I mean  
 11 you can have a few minutes.

12 ARGUMENT III

13 BY MR. LOVELL:

14 MR. LOVELL: I know it's five to 1:00, Your Honor.

15 I want to go over the Morales decision. In their  
 16 reply brief they made a new argument that although -- I think  
 17 it's more efficient if I just say what happened.

18 THE COURT: Yes.

19 MR. LOVELL: Morales, the Attorneys General who  
 20 were involved never raised the foreign air carrier issue until  
 21 the Schtunkey (phonetic) plaintiff in the Lawal case contacted  
 22 them when they did their reply brief in the Supreme Court and  
 23 said hey, you want to argue this. In their reply brief they  
 24 raised for the first time an issue that wasn't in the  
 25 questions presented, that wasn't in the Court below. It had

1 never been considered by any court. And the Supreme Court  
 2 said nothing about it.

3 So, we cited all of these Supreme Court decisions,  
 4 involving Supreme Court jurisprudential rules when they don't  
 5 decide questions that aren't included in the questions  
 6 presented originally, weren't raised in the Court below, only  
 7 appear in a reply brief.

8 But then, the defendants came back, and so,  
 9 therefore Moral es does not address this. It was not raised.  
 10 The res judicata with the Attorneys General in that case,  
 11 yeah, but it's not stare decisis for anybody.

12 In their reply brief the defendants come back and  
 13 say well, they must have really considered it, it must really  
 14 be law because it was the only way there would have been  
 15 subject matter jurisdiction over the foreign air carriers is  
 16 if there was an ADA preemption issue as to them, so they had  
 17 to think about foreign air carriers. Not true. The 10  
 18 intervening foreign air carriers intervened as of right under  
 19 24A. British Airways was likewise entitled. That's in our  
 20 bullets, and I've given the slides to everybody.

21 Moreover -- this is the last bullet, Your Honor --  
 22 not one of the defendants' subject matter jurisdiction cases  
 23 holds or implies that a foreign air carrier could use the ADA  
 24 preemption provision to establish Federal jurisdiction. It  
 25 wasn't in the case.

1                   So, Your Honor is left with the statute, not --  
 2 Morales didn't take this away from it. In the defendants'  
 3 opening papers, they said: Interpret the statute. In the  
 4 reply papers, they put in five new arguments. One which is,  
 5 you can't interpret the statute, Morales is decided. Not  
 6 true.

7                   So the whole issue comes down to this, Your Honor.  
 8 The defendants do not say that the '78 statute covered foreign  
 9 air carriers. And I wouldn't expect Mr. Sherman unnecessarily  
 10 to say that, and that's fine.

11                  But their whole argument comes down to this. Would  
 12 you put the '84 statute up.

13                  (The above-referred to slide was published to the  
 14 courtroom.)

15                  MR. LOVELL: I submit to Your Honor, that if you  
 16 take their data points and compare it -- go to the preemption.  
 17 The '84 preemption.

18                  (The above-referred to slide was published to the  
 19 courtroom.)

20                  MR. LOVELL: It all comes down to this, Your Honor.  
 21 Mr. Sherman says, if it stops at air carriers, the foreign air  
 22 carriers would have no preemption. It all comes down to  
 23 having authority under subchapter four of this chapter to  
 24 provide air transportation. Okay. That has full meaning if  
 25 it's limited to air carriers. That does not need to be

1 exploded into foreign air carriers to have meaning. I think  
 2 if Your Honor looks at their data points, the South African  
 3 Air case, the statute could have no meaning unless you gave up  
 4 the normal way of doing things and applied this to South  
 5 Africa.

6 THE COURT: You'll have to just explain that in a  
 7 little more detail. I'm not following that argument.

8 MR. LOVELL: In South African Airways, which is not  
 9 a Second Circuit case, Congress only used the word air  
 10 carrier, but they did apply the statute to South African  
 11 Airways. And it was anti-Apartheid Act. The only one who  
 12 could be covered was South African Airways. Airlines.

13 THE COURT: No, but what I'm focusing on is that  
 14 phrase, "having authority under subchapter four of this  
 15 chapter to provide air transportation."

16 MR. LOVELL: Yes.

17 THE COURT: "As a limitation, or as an expression  
 18 of what the words air carrier means."

19 And so that, to the extent that an air carrier has  
 20 authority under subchapter four of this chapter to provide air  
 21 transportation, it is covered. That's their argument, I  
 22 think.

23 MR. LOVELL: Yes, and that's true.

24 THE COURT: And so, but you were saying somehow  
 25 that's --

1 MR. LOVELL: Sorry, Judge. I know I'm interrupting.

2 THE COURT: That's all right, go ahead.

3 MR. LOVELL: My answer's already there. An air  
4 carrier is not a foreign air carrier. Over and over again, 52  
5 times.

6 THE COURT: Okay, I see.

7 MR. LOVELL: Congress says air carrier and foreign  
8 air carrier. This 2 and 3 are limiting phrases on air  
9 carrier. They are not expanding phrases to throw it out, and  
10 that's why I say just look at the statute.

11 Do you have the statute?

12 (The above-referred to slide was published to the  
13 courtroom.)

14 THE COURT: Why is it not, why is it not, why is the  
15 Court, I guess your argument is the Court should always  
16 interpret air carrier, that phrase, consistent with the  
17 definition provided elsewhere in the act unless it is clear  
18 that the --

19 MR. LOVELL: That's what we're trying to say.

20 THE COURT: -- unless it's absolutely clear that it  
21 was not meant to.

22 MR. LOVELL: Yes. In those data two points that  
23 they have, yes, that's my argument. Under the Second Circuit,  
24 you always have to interpret air carrier to be air carrier  
25 unless there is no other way to do it. And their two data

1 points, 44904 and the South African Airways case put the  
 2 Hobson's choice to the Court. And there is no Hobson's choice  
 3 here.

4 You can easily -- and here's two other sections  
 5 here. Here's just examples of 52 times when Congress uses  
 6 both. 49 U.S.C. 40109(a)(1): "An air carrier not engaged  
 7 directly in operating aircraft in air transportation."

8 Well, the defendants' reading is air transportation  
 9 could pick up part of -- no, no, but Congress always goes on.  
 10 "B: A foreign carrier not engaged directly in operating  
 11 aircraft in foreign air transportation."

12 Over and over, Congress will use both terms, and  
 13 both will have an adjective restricting phrase afterwards.  
 14 And we put 26 examples in our brief. And the Lawal case is  
 15 just wrong.

16 Lawal is just wrong. Lawal thought, as defendants  
 17 argue, that that expanded the first. I know it's 1:00  
 18 o'clock, Judge, I better stop.

19 THE COURT: I understand.

20 MR. LOVELL: It narrows the phrase, Your Honor. And  
 21 because it narrows the phrase, Your Honor is not confronted  
 22 with the situation of those two cases.

23 Your Honor can give full meaning to the statute by  
 24 reading it the way the plaintiffs want to. And Your Honor  
 25 does not read the statute, and renders the definition

1 superfluous if you use those data points that the defense has,  
 2 of those two cases, and bring it in here when the statute  
 3 makes perfect sense this way.

4 THE COURT: What renders what superfluous? That's  
 5 the part of the argument I'm not following.

6 MR. LOVELL: The definition -- in other words, to  
 7 read the statute doesn't just mean read this section. It  
 8 means read from 1938 forward. Air carrier and foreign air  
 9 carrier are different. And the minute you say you're  
 10 exploding air carrier into a shorthand term for air carrier  
 11 and foreign air carrier, you are rendering superfluous the  
 12 statutory definition, which is in the first hierarchy. You're  
 13 supposed to look at all the language in the statute in  
 14 interpreting any provision.

15 THE COURT: I see.

16 MR. LOVELL: Okay. And that's what Lawal did.  
 17 Lawal rendered the definition superfluous in order to say the  
 18 broadest possible meaning, if we get to the -- the broadest  
 19 possible meaning of having authority in air carrier. In order  
 20 to give the broadest possible meaning of that, I am going to  
 21 disregard the statutory definition of air carrier. 52 other  
 22 provisions of law would have to change. All the times that  
 23 the defendants have gotten the benefit of this in all their  
 24 cases, everything would have to change if there's an adjective  
 25 phrase that could apply to both.

## Argument III / Mr. Lovell

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1 THE COURT: Okay. I think I get it.

2 MR. LOVELL: It can only apply to foreign air  
3 carrier.

4 MR. SHERMAN: I'm sorry, can you give me one more  
5 minute?

6 Mr. Lovell's presented sort of a moving target. I  
7 just want to make sure that at least one or two things that he  
8 said are clear for the Court in terms of defendants'  
9 provision. I'm happy to do from here.

10 THE COURT: All right.

11 MR. SHERMAN: Thank you, Your Honor.

12 On the Morales and Maddox case, the Morales case,  
13 Maddox below. First of all, as the Lawal Court held, as many  
14 courts have held, on a question of subject matter jurisdiction  
15 there can be no waiver.

16 THE COURT: All right. I follow that argument.

17 MR. SHERMAN: All right. The Lawal, the Court  
18 specifically held that "Congress preempted this area to  
19 maintain uniformity and avoid the conclusion and burdens that  
20 would result if interstate and international airlines were  
21 required to respond."

22 So, it wasn't just raised that the question of  
23 international was present below as well as in the Supreme  
24 Court.

25 Mr. Lovell said we concede -- and if I gave this

1 impression to the Court, I apologize -- we don't concede that  
 2 if you stop at the word air carrier, that there's no  
 3 preemption for foreign airlines.

4 We say when you look at the whole provision, it's  
 5 clear. But the problem is that even if you were to stop at  
 6 foreign air carrier --

7 THE COURT: At foreign?

8 MR. SHERMAN: I'm sorry, at air carrier, what they  
 9 suggest just makes no sense in the larger context of the  
 10 statute.

11 Congress intended to deregulate the airline industry  
 12 and specifically with regard to rates, routes and services.  
 13 It would make no sense in doing that if, without saying  
 14 anything, what they intended to do was not allow any Federal  
 15 regulation, but indeed allow all the states and indeed  
 16 subdivisions of the states.

17 THE COURT: I understand that. Although one would  
 18 have to concede that before the words interstate air  
 19 transportation came out, interstate came out, and that it was  
 20 designed to only affect domestic.

21 MR. SHERMAN: No, I don't agree, Your Honor.

22 THE COURT: You don't concede that?

23 MR. SHERMAN: No. The statute was focused on  
 24 interstate. Although it's not clear whether they meant  
 25 interstate as opposed to intrastate, because they specifically

1 all I owed continued regulation of airlines within the state.  
2 But without any express provision about the foreign air  
3 carriers, I don't agree that interstate necessarily meant at  
4 that time.

5 THE COURT: Okay.

6 MR. SHERMAN: And in terms of the Lawal, of course  
7 Mr. Lovel I's going to say it's wrong. How could he say  
8 otherwise? It directly defeats their position.

9 There's a rule of construction that Congress has  
10 presumed to be aware of decisions. The Lawal decision, the  
11 Morales decision, all happened before the 1994 recodification  
12 where Congress made no substantive change in the statute.

13 I suggest that this court should do what every other  
14 court has done in looking at this provision.

15 THE COURT: All right. I've got it. Thank you,  
16 folks.

17 We'll reconvene at 2:20. That gives us an hour and  
18 15 minutes.

19 MR. HAUSFELD: Your Honor, may I request, what is  
20 the agenda for this afternoon?

21 THE COURT: Well, we'll pick up in the order that we  
22 had before. I can't remember. Let me see.

23 I think we start off with the foreign law claims.

24 MR. HAUSFELD: Thank you.

25 (Continued on following page with AFTERNOON SESSION.)

### Argument III / Lovell

1 | AFTERNOON SESSION

2 ARGUMENT III.

3 BY MR. LOVELL:

4 THE COURT: All right.

5 MR. LOVELL: Your Honor, Chris Lovell. Could I,  
6 talking at lunch about the oral argument, and being used to  
7 singing for my supper for 30 years as a contingent, we would  
8 like to put in a three-page letter, if that would be okay, to  
9 cover the point at the end about what the statute means when  
10 interstate run out.

11 THE COURT: I've got so much paper here. If I let  
12 you put in three pages, they would want to put in six, and  
13 then you'll want three more. Is it something that really is  
14 not within the papers that you already submitted?

24 THE COURT: I think I think anxious what point it is  
25 you want to elicit.

## Argument III / Lovell

1                   MR. LOVELL: Sorry, your Honor. Congress when it  
2 has wanted to include foreign air carry in a provision has a  
3 pattern in the legislative history and changes in the statute  
4 it has done. It is like your Honor said, if air carrier can  
5 only have a meaning that relates to the foreign air carry,  
6 that's one thing. I wanted to pull that stuff out of our  
7 brief and show it to your Honor.

8                   THE COURT: Out of the brief that you already  
9 submitted, though?

10                  MR. LOVELL: Well, no. Some of it is in the  
11 surreply. Only in the reply did they bring up one of the  
12 issues. They only brought up this 44901 in their reply and  
13 we haven't addressed that at all.

14                  THE COURT: You want to address 44901?

15                  MR. LOVELL: Yes.

16                  THE COURT: And that was on the notion that it was  
17 only addressed in the reply papers, I mean?

18                  MR. LOVELL: Only came up in the reply. But the  
19 Overlobby? case (ph) and the South African Airways case were  
20 the other two parts of the letter, your Honor.

21                  THE COURT: I see.

22                  Mr. Sherman, is it true that you raised this in your  
23 reply? I mean, I'm not saying there's anything wrong with  
24 that. But should I give Mr. Lovell a chance to put in his  
25 two cents on that? You will say no, and I will say, what if

## Argument III / Lovell

1 I give you your two pages on it?

2 MR. SHERMAN: Let me tell you why the answer for us  
3 is no. The same reason we didn't think that their surreply  
4 should be accepted by the court. We made the basic argument,  
5 which I tried to make today, the plaintiffs raised a number  
6 of arguments in their lengthy opposition. We attempted to  
7 respond to those arguments in the reply. We didn't raise new  
8 arguments in our reply. We responded to their argument.

9 I think it is safe to say that Mr. Lovell here today  
10 had a chance to make all of the points that he made in his  
11 surreply, and he made a lot of the points. As far as I could  
12 tell, he may have made them all between what he said and the  
13 power point he put out and handed up to the court. We don't  
14 think there's any reason for the court to have any further  
15 briefs on this.

16 THE COURT: Mr. Lovell, you make a very attractive  
17 presentation, but I do think that the points you made are  
18 adequately covered. They were adequately covered in your  
19 argument, and if I permit further papers on this, I will get  
20 those same requests with respect to every other issue that we  
21 touch on today, and I have quite enough.

22 MR. LOVELL: I understand.

23 THE COURT: I mean, I did get your handout. I think  
24 it was useful in terms of tracking through your argument.  
25 And I do have the benefit of the transcript, which we will

## Argument IV / Warnot

1 undoubtedly be consulting. So I don't think any of the  
2 points that you made will be lost.

3 MR. LOVELL: Thank you.

4 THE COURT: All right. So let's move to item number  
5 four, Foreign Law Claims. Give me a moment. Let me pull out  
6 my papers and we'll get started on that.

7 Mr. Warnot?

8 ARGUMENT IV

9 BY MR. WARNOT:

10 MR. WARNOT: James Warnot of Linklaters LLP for  
11 Societe Air France, and I'm making this argument on behalf of  
12 the entire defense.

13 As your Honor noted, Mr. Ogden would be arguing as  
14 well. Lufthansa has made a separate motion on the foreign  
15 law claims, and we have discussed in advance how we are going  
16 to handle this. So we'll try, to the extent possible, to  
17 eliminate duplication of what we say.

18 Broadly speaking, the issue before the court is  
19 whether this is going to be the first U.S. court to accept  
20 litigation in the United States of a European union statutory  
21 antitrust claim between a bunch of foreign parties involving  
22 conduct that occurred outside the United States. That's what  
23 plaintiffs are asking you to do by accepting jurisdiction in  
24 this case. This motion applies to four of the counts, Counts  
25 Four, Five, Six and Seven, and at least as to a couple of

## Argument IV / Warnot

1 those counts, they don't impact the United States in any way  
2 because they are for shipments from the EU to places around  
3 the world, except for the United States.

4 THE COURT: Just to help me out, because I  
5 consistently get confused about this, Counts Six and Seven  
6 are claims involving entirely overseas transactions,  
7 transactions that took place overseas, and shipments that  
8 went from point to point outside of the United States?

9 MR. WARNOT: That's Seven.

10 THE COURT: That's seven.

11 MR. WARNOT: Six is mixed U.S., non U.S. it is only  
12 foreign plaintiffs. The class is composed of people outside  
13 of the United States, both direct and indirect purchasers,  
14 and the shipments at issue are shipments from the EU, places  
15 outside of the United States, as well as to the United  
16 States, but only under Article 81.

17 THE COURT: Right. Well, some of those would be  
18 encompassed elsewhere, would they not?

19 MR. WARNOT: Well --

20 THE COURT: Would be encompassed under some of the  
21 other counts, Sherman Act counts?

22 MR. WARNOT: Potentially Counts Four and Five are  
23 somewhat different classes.

24 Count Four is the direct U.S. purchaser -- excuse  
25 me, direct U.S. shipments where the class members are

## Argument IV / Warnot

1 entities within the European union who are making shipments  
2 to the United States and direct purchasers.

3 Count Five is the same thing, except they are  
4 indirect purchasers. But the class -- both the class  
5 representatives and the class definition were all in favor of  
6 those Europeans only.

7 THE COURT: Okay. Right.

8 MR. WARNOT: The way I want to proceed, your Honor,  
9 is to first examine jurisdiction, does the court have  
10 jurisdiction? And then, you know, if it were to have  
11 jurisdiction, should it exercise that jurisdiction? And,  
12 finally, do the plaintiffs state a claim for relief, assuming  
13 the answer to the first two is "yes."

14 So the first question is, is there jurisdiction  
15 under the Class Action Fairness Act, CAFA. And CAFA, as I'm  
16 sure the court is aware, has relaxed diversity of citizenship  
17 requirements and has a relaxed amount in controversy  
18 requirement, and it permits its class members to aggregate  
19 individual amounts of controversy. But it has the  
20 requirement that it is a class action, and in assumption in  
21 that is that it is a claim properly brought as a class  
22 action. And the short answer to whether in fact the claim  
23 like this has been answered by judges of this court three  
24 times in the last year and a half, as well as by Judge Baer,  
25 and we talked quite a bit in the papers about the Bonime

## Argument IV / Warnot

1 case.

2 In addition, we cited Judge Bianco's decision in  
3 Holster v. Gatco, in March 2007. What we didn't cite was  
4 Judge Block's Gratt v. Eurotravel, 2007 West Law 2693903,  
5 very similar case, though. And of similar import is Judge  
6 Baer's decision in Giovanniello v. New York Law Publishing in  
7 August of 2007.

8 In each of those cases, there was a claim, actually  
9 a federal statute, but a federal statute for can there was no  
10 federal question jurisdiction, and a claim that could only be  
11 brought under the state procedures. And under the statute in  
12 New York, again not the statutory class action procedures,  
13 but it is a statute that determines whether something can  
14 even be brought as a class action. Those claims could not be  
15 brought as a class action in state court, because in fact  
16 they had a statutory penalty associated with them.

17 In analyzing that case, I would just look to Judge  
18 Amon first. She said that provision for eerie purposes, it  
19 is substantive, rather than procedural, and, as a result, the  
20 state law governs. There can't be a class; therefore, you  
21 can't have CAFA; therefore, there's no subject matter  
22 jurisdiction. And it is very clear in that case that the  
23 basis for the decision wasn't anything peculiar about the  
24 language of the underlying statute. It was the fact that the  
25 application of CPLR 901(b), which was a state statute

## Argument IV / Warnot

1 prohibiting a class action in those circumstances, was  
 2 substantive because it was determinative of whether the  
 3 outcome would be the same in state or federal court, and the  
 4 rule of guaranty trust.

5 We had the same situation here. There's no New York  
 6 State statute. We have claims brought under foreign law, and  
 7 the same rulings apply in diversity cases, whether it is  
 8 state law or foreign law, in which for each EU member state  
 9 it's a fundamental aspect of their law, the claims are  
 10 personal and they can't be brought on a class basis, at least  
 11 not on a class basis as we know it here, namely an opt out  
 12 class action. And there doesn't seem to be any dispute on  
 13 that from plaintiffs.

14 Now, what plaintiffs are saying is that in fact all  
 15 we are arguing is that there's a different rule of procedure.  
 16 It conflicts with Federal Rule of Civil Procedure 23, and,  
 17 therefore, under Hanna v. Plumer, the federal rule controls.

18 The first problem with this argument, it's been  
 19 rejected by the courts that have ruled on this issue  
 20 recently. It was only done inferentially, really, by Judge  
 21 Amon in her decision in Bonime. There's a footnote referring  
 22 to the issue that having been decided in the other case, and  
 23 it was addressed directly by Judge Bianco in the Holster  
 24 case, by Judge Block in the Gratt case, and by Judge Bear in  
 25 the Leider v. Ralfe, which is discussed in more detail in the

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1 papers. The reason that these courts looked at it in this  
2 way is because they held that Rule 23 establishes  
3 requirements for class certification, commonality, et cetera,  
4 et cetera; whereas, there's a threshold question as to  
5 whether a particular claim is even eligible for class  
6 treatment in the first place. That's what CPLR 901 really  
7 addresses.

8           Actually, in CPLR 901, which is the New York Class  
9 Action statute, 901(a) is really the counterpart to Rule 23  
10 where you look at whether a class is certified; but 901(b)  
11 establishes a substantive rule saying you can't have a class  
12 action in circumstances like the circumstances present in  
13 that case, and those are the same circumstances present here.

14           Now, one thing that I should note that both the a  
15 and Holster cases are presently on appeal to the Second  
16 Circuit, and that appeal was argued on March 12th, and  
17 presumably sometime before too long we are going to have a  
18 decision.

19           The second point is if there's no diversity  
20 jurisdiction, should the court exercise supplemental  
21 jurisdiction?

22           The parties haven't really argued about whether  
23 there's a common separate act. I think for purposes of this  
24 argument we are not disputing that, but there are three  
25 reasons that the court shouldn't exercise supplemental

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1 jurisdiction.

2 The first one is the same reason the court shouldn't  
3 exercise diversity jurisdiction, namely that the nature of  
4 this claim bringing an Article 81 as a class action, when  
5 that is not recognized, and it would be, you know,  
6 fundamentally contrary to European law. It is no less  
7 abhorring under supplemental jurisdiction, than it would be  
8 under diverse jurisdiction. Judge Baer ruled to that effect  
9 in Leider v. Ralfe, which was in a little bit of a different  
10 context, because there the defendant had defaulted and he was  
11 looking at class certification, but he so held, and we cited  
12 that in our papers.

13 In addition, you need to look to the factors under  
14 28 U.S.C. 1337(c), two of which we relied upon for saying  
15 there shouldn't be supplemental jurisdiction.

16 The first is complex issues of foreign law.

17 Now, the plaintiffs say, oh, this is really simple.  
18 You got Article 81. You got Section One. They both prohibit  
19 agreement, and that's the end of the story. There's nothing  
20 complex about it at all. I mean, there are a whole lot of  
21 problems with that.

22 First of all, their main claims under English law,  
23 which I will get to later, doesn't cover most of the class  
24 members here, but was just under English law. There are  
25 still a lot of issues that are not at all simple, and in fact

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1 are decided under English law, probably for most of which is  
2 the status of the pass on defense and whether indirect  
3 purchasers have standing.

4 As set forth in our declaration of Richard Plender  
5 QC, both of those issues are undecided under English law, and  
6 those issues are obviously very important to the case. You  
7 know, would we have the pass on defense, the direct  
8 purchasers to the indirect purchasers have claims, meet  
9 pretty fundamental issues in this case.

10 So where those things are undecided, it would be  
11 inappropriate to be asking you to decide these issues of  
12 English law, when English courts haven't decided yet; and the  
13 fact that an issue of foreign law has not yet been decided,  
14 it is in fact one of the factors that the courts rely on in  
15 rejecting supplemental jurisdiction.

16 In addition to that, there's I guess I will call it  
17 the catchall provision of 28 U.S.C. 1367(c), or the so-called  
18 exceptional circumstances provision.

19 Now, clearly, exception means exception, rather than  
20 the rule. But, you know, as the Ninth Circuit held in the  
21 Executive Software case, which was adopted as the standard in  
22 the Second Circuit Russian News Agency case, that inquiry is  
23 not particularly burdensome. You have to look at the  
24 surrounding facts and see whether this indicates that it  
25 makes sense to keep it in this court. As in our papers, the

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1 same comity considerations for arguing that it should be  
2 dismissed on comity considerations alone, would constitute  
3 the exceptional circumstances.

4 I then move on to a form non-convenience. All I am  
5 going to say on that, Mr. Ogden will be arguing it, and we'll  
6 be relying entirely on his argument.

7 The secondary discretionary argument is the doctrine  
8 of comity. Again, Mr. Ogden will largely handle that, but I  
9 would like to make a couple of points.

10 Plaintiffs whole opposition depends upon their  
11 argument that you can't have a comity dismissal unless  
12 there's a conflict between the law that is sought to be  
13 applied and U.S. law.

14 Now, we say that is wrong as a matter of law.  
15 Lufthansa articulates it somewhat differently. We followed  
16 the language in Justice Scalia's dissent in Hartford Fire in  
17 which we say there's prescriptive comity and prescriptive  
18 comity is a doctrine where a plaintiff seeks to have a United  
19 States court apply U.S. statutory law for conduct occurring  
20 outside the United States. In that situation, what the court  
21 has to look at is, is there in fact a conflict - and there's  
22 a provision in the cases about how strong that conflict has  
23 to be - but is there a conflict between charging someone  
24 based on exterior conduct under our laws versus having been  
25 treated under the laws of jurisdiction in which they acted.

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1 That's really the only context in which an analysis makes  
2 sense.

3 Comity, of course, is a much more flexible doctrine.  
4 In fact, in the Biggio case in the Second Circuit, when the  
5 lower court had dismissed on comity grounds, based on a case  
6 in the Ninth Circuit called Timberlane, which essentially  
7 applies the same test, you look at whether there's a  
8 conflict. The Second Circuit in Biggio said that's the wrong  
9 test. The test in this case is whether adjudication of the  
10 claim would offend amicable working relationships with the  
11 other sovereign, and for a whole host of reasons that  
12 plaintiffs really haven't contested because they relied so  
13 much on this conflict argument. That's certainly the case,  
14 and I will permit Mr. Ogden to get into all of those, and not  
15 bog this proceeding down with covering it twice.

16 I want to spend just a couple of minutes addressing  
17 the notion that accepting jurisdiction would advance comity.  
18 This is an argument that plaintiffs put forward. Our  
19 response to that would be, with all due respect, that's  
20 certainly more. It is nothing more than displaying attitude  
21 that we in the United States know best how to litigate, and  
22 we in the United States know best how to handle your claims.  
23 And it's in the context of a situation where Europe's highest  
24 court has said to national courts, you must adjudicate these  
25 claims. You must provide a remedy for people in Europe.

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1           It is almost like saying because it takes us 50  
2 years to try to implement Brown v. Board of Education, that  
3 courts in some other countries should take on those claims.  
4 European courts being around for a long time have established  
5 procedures. Whether we disagree or agree with those  
6 procedures doesn't advance comity to take away those cases  
7 from them here in the United States. There's no connection  
8 to them.

9           I would lastly turn, assuming the court has  
10 jurisdiction and decides appropriately to exercise that  
11 jurisdiction, have they in fact stated a claim?

12           So they stated the claim two different ways.

13           The first way is directly under Article 81 and  
14 Article 53 of the EEA, and that clearly doesn't state a  
15 claim. I don't think they are really trying to say anymore  
16 that it does. Certainly their experts say you can't do that  
17 because properly stating the claim under Article 81 is an  
18 amalgam of both European law and member state law. But in  
19 addition to that, they stated a claim under English law that  
20 incorporates Article 81, then you need to look at English law  
21 and see in fact how that works with respect to this class.

22           What the plaintiffs' expert has said is - and again  
23 when I say plaintiffs' expert, what I'm really referring to  
24 is plaintiff's co-lead counsel's partner sitting in London,  
25 but we'll put that aside for a minute - he notes that the

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1 plaintiffs have pleaded English law and assume,  
2 quote/unquote, that our conflict laws would permit those  
3 claims to be the entire class. I would say that's a bad  
4 assumption.

5 First of all, our conflicts laws, looking at classic  
6 New York interest analysis and looking at the claims of a  
7 freight forwarder in Austria shipping product to Singapore,  
8 how is it that English law -- that our conflict ruling were  
9 points to English law? It is an impossibility. Our expert  
10 has indicated English laws are not much different from that.  
11 Our expert Richard Plender QC, who I would add since February  
12 1st is Mr. Justice Plender in high court.

13 THE COURT: Not your partner.

14 MR. WARNOT: Not a partner, but maybe it adds a  
15 little something to his declaration. He explains how it  
16 would work if they try it, assert the claims of the entire  
17 class under English law as pleaded.

18 First of all, is the issue of class members who have  
19 nothing to do with England, and where the conduct at issue  
20 has nothing to do with England and produces no effects on  
21 England. Those claims would fail to state a claim for relief  
22 under English law. And I have not seen anything  
23 contradicting that from anything put in by the plaintiffs,  
24 because they have in fact just assumed that England law  
25 covers everything.

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1                   The second category of individuals are people who  
2 are not named plaintiffs, but who in fact perhaps might be  
3 residents in England, and against who perhaps conduct may  
4 have been directed. As to those, because of the absence of a  
5 class mechanism in England, they won't state a claim another.  
6 So by our count, that leaves us Volvo Logistics (UK) Limited,  
7 and that's it. That all of the rest, Counts Four, Five, Six  
8 and Seven fail to state a claim. Unless you have questions,  
9 I will turn it over to Mr. Ogden.

10                  THE COURT: One question.

11                  Mr. Ogden will be addressing for non-convenience, as  
12 I understand it, but one of the steps in the Court's analysis  
13 is whether there's an adequate alternative forum. Maybe you  
14 can address that on behalf of all of the other defendants, as  
15 opposed to just Lufthansa, who is carrying its freight only  
16 for Lufthansa.

17                  MR. WARNOT: Yes. We are adopting their argument as  
18 well. Very simple, the requirement of an adequate  
19 alternative forum doesn't require the procedures to be the  
20 same; doesn't require the remedies to be the same.

21                  THE COURT: But is there a single forum where this  
22 could all happen?

23                  MR. WARNOT: I don't view that as requiring that  
24 there would be -- that there needs to be a single forum where  
25 this could all happen, where class actions aren't allowed in

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1 Europe. What you got is a situation where European court of  
2 justice, to which all member states have agreed to abide by  
3 its decisions, has said you must provide a remedy. There's  
4 nothing in form non-convenience law that I know of that says  
5 where you bring a claim on behalf of a widely scattered class  
6 - and in fact that claim is not properly brought as a class  
7 action - that there has to be a single forum for each and  
8 every one of those class members in bringing a claim.

9 THE COURT: Okay.

10 (Continued on the next page.)

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1 ARGUMENT IV (Continued)

2 BY MR. WARNOT:

3 MR. WARNOT: And in fact that claim is not properly  
4 brought in the class action. Because there has to be a single  
5 forum where each and every one of those class members can  
6 bring a claim.

7 THE COURT: Okay. All right.

8 MR. WARNOT: Thank you.

9 ARGUMENT IV

10 BY MR. OGDEN:

11 MR. OGDEN: David Ogden, Your Honor, for Deutsche  
12 Lufthansa AG, Lufthansa Cargo and Swiss International  
13 Airlines, three companies under common ownership that are not  
14 members of the joint defense group, somewhat differently  
15 situated. My clients are leniency applicants.

16 As you know, Your Honor, we've been accepted into  
17 the liens and programs of both the Justice Department here in  
18 the United States and the European Commission.

19 And as Your Honor is also aware, we have, our  
20 clients have reached a settlement with respect to all U.S.  
21 represented commerce preliminarily approved now by the judge  
22 following your recommendation, which includes Counts 1 through  
23 5 and such parts of count 6 and 7 as involved commerce to,  
24 from or within the United States.

25 What we have not settled, my clients have not

1 settled, Counts 6 and 7 to the extent they involved commerce,  
 2 as Your Honor put it, exclusively in points in Europe and  
 3 places elsewhere in the world, not including the  
 4 United States. Claims that are brought in by the plaintiffs  
 5 only pursuant to European law in the course of their  
 6 complaint.

7 Now we do, although not a member of the joint  
 8 defense group, we do agree with the arguments that Mr. Warnot  
 9 has made and that the other defendants have made with respect  
 10 to those claims. And we agree that there's no jurisdiction  
 11 under CAFA, and should not be jurisdiction as a matter of  
 12 supplemental jurisdiction in this court, for the reasons that  
 13 they've stated and I will revisit them.

14 But we make the further submission, Your Honor, that  
 15 even if there were jurisdiction here, they would be  
 16 appropriate for this court to dismiss under the principles of  
 17 foreign nonconvenience and under the principles of comity,  
 18 which are related doctrines, but doctrines that are distinct.  
 19 And I want to make just a few points in support of that  
 20 submission.

21 First, I think it is difficult to imagine a set of  
 22 claims that could be configured in a way that would be more  
 23 appropriate for foreign nonconvenience dismissal than these.  
 24 The Gilbert case, which addresses the doctrine at the Supreme  
 25 Court level, talks about the question being a question of the

1 nexus of this forum versus the other forum to the facts and  
 2 the law involved in the claims. And here, with respect to the  
 3 claims that we're talking about, we have exclusively foreign  
 4 commerce, indeed the United States is the only country in the  
 5 world that is not connected to the commerce that's at issue in  
 6 this count because it is between Europe and everywhere else.

7 Exclusively foreign law, only under the law of these  
 8 claims, only sought to be adjudicated under the law and under  
 9 the law of England. Exclusively foreign named plaintiffs.  
 10 All of the named plaintiffs that have come before this court  
 11 to advance these claims are domiciliaries of foreign  
 12 countries.

13 THE COURT: I thought that six was, wasn't that  
 14 foreign and U.S. mixed?

15 MR. OGDEN: Six is foreign and U.S. mixed commerce.

16 THE COURT: Commerce, but not domiciliaries.

17 MR. OGDEN: It doesn't -- but it is exclusively  
 18 foreign domiciliaries. But my point is, seven I think admits  
 19 the possibility of U.S. domiciliaries within the class, but  
 20 all of the named plaintiffs in Count 7 are foreign.

21 THE COURT: Okay.

22 MR. OGDEN: And similarly, with respect to Count 6;  
 23 all of the named plaintiffs are foreign. And so, that the --  
 24 so that the existence of U.S. based entities with those claims  
 25 are hypothetical, although possible from the point of view of

1 form nonconvenience doctrine, the key issue that other courts  
 2 have looked at is the residence of the named plaintiff because  
 3 it is they whose convenience is primarily at issue since they  
 4 will be prosecuting the claims.

5 And finally, the defendants are overwhelmingly  
 6 foreign. Two out of the 39 defendants are U.S. entities and  
 7 they are under common ownership. Now, in these circumstances,  
 8 there should be really no deference accorded to the  
 9 plaintiffs' choice of the U.S. forum. The case law, in  
 10 particular the recent decision in the Austrian ski train  
 11 disaster case, is perhaps the most recent one to identify that  
 12 if a foreign plaintiff decides to bring a case in the United  
 13 States based on foreign law and concerning primarily foreign  
 14 events, their choice of forum is due very little, if any,  
 15 deference. And obviously, their convenience is not  
 16 particularly served by it and it would appear to be a matter  
 17 of a forum chart.

18 I want to turn next to the critical issue that  
 19 Your Honor identified, which is the question as to whether  
 20 there is an adequate alternative forum.

21 And I think the answer to that is that clearly for  
 22 the claim that the plaintiffs have pled, which they seek to  
 23 rely entirely on EU law supplemented as it must be as  
 24 Mr. Warnot observed, by a national law, they relied entirely  
 25 on English law. And their expert witnesses have said English

1 under English choice of law principles would apply English law  
 2 to all of the claims. And that is the submission that the  
 3 plaintiffs have brought to this court in the United States.

4 We don't know entirely with certainty what choice of  
 5 law principles the English courts would apply, but that's the  
 6 claim that the plaintiffs have brought here. We think  
 7 clearly, England -- or if not England some other court in the  
 8 EU -- would be an adequate alternative forum. The test there  
 9 is whether the defendants would be amenable to service in that  
 10 other forum and whether the courts would permit litigation of  
 11 the subject matter of the claim, that's Pollack's holding, for  
 12 example. The Second Circuit lays that out, but that's really  
 13 black letter law.

14 With respect to amenability to service, the  
 15 plaintiffs have not intended that any defendant is not  
 16 amenable to service in England, for example. And their  
 17 experts, Mr. Layton and Mr. Smith, have explained in their  
 18 affidavit, in their declaration, they lay out the argument for  
 19 the reason why all defendants are amenable to service. They  
 20 say that because there are U.K. defendants, they can bring in  
 21 all other EU domiciled defendants pursuant to Article 6(1) of  
 22 Regulation 44/2001, which allows all EU domiciled  
 23 co-defendants to be brought in if there is a domiciliary  
 24 reform state who is a defendant, and in the interest of  
 25 justice so serve. And again, it is the opinion of plaintiffs'

1 expert at paragraphs 24 to 25 and paragraph 30 of the Layton  
 2 and Smith affidavit.

3                   And with respect to non-EU, the non-EU defendants,  
 4 they also say they can be brought before a single English  
 5 tribunal pursuant to English Rule of Civil Procedure 6.20.  
 6 And this is laid out in their submission. And they say that  
 7 the rules in England would permit -- this is a quote: "The  
 8 concentration of proceedings and claims in a single  
 9 well-equipped English forum, further submitting the law would  
 10 apply to all the claims".

11                   Again, whether or not that's so, the key point is  
 12 that the plaintiffs have not contested the amenability of  
 13 service of the defendants in England.

14                   Second, as to whether England permits the litigation  
 15 of the subject matter of these claims, the Second Circuit has  
 16 already decided that issue resoundingly in the affirmative in  
 17 the Capital Currency Exchange decision, which is a  
 18 Second Circuit decision 1998 where plaintiffs sought to bring  
 19 claims under the Sherman Act. And the Second Circuit approved  
 20 dismissal of those claims under forum nonconvenience so that  
 21 they could be litigated in Europe under European law saying  
 22 that Europe courts are open and provide a remedy. It's not  
 23 identical, but it doesn't have to be. And they sustained the  
 24 dismissal there on the ground that England was an adequate  
 25 alternative forum.

1           And you know, that conclusion really is one that I  
 2 think as a matter of comity and respect for the coordinate  
 3 system of justice in Europe, this court really has to reach.  
 4 It is a principle of European law, which has been identified  
 5 in the Courage decision, which is cited in all of the papers;  
 6 that the member states must provide an effective remedy for a  
 7 violation of rights under Article 81. The remedy must be  
 8 effective if there's a violation of rights and the court has  
 9 set aside actual rules that limit that in any respect. That  
 10 means that it can't be practically impossible or excessively  
 11 difficult. That's the formulation that the Europeans insist  
 12 that the national courts observe in providing damages remedies  
 13 to persons whose rights have been violated under Article 81.

14           And so, particularly given the Second Circuit's  
 15 ruling, but as a matter of respect for that system, this court  
 16 I don't think could take the decision that the remedies  
 17 afforded will not be effected given that European courts are  
 18 fulfilling that mandate. So, we believe there's clearly an  
 19 adequate forum. I think plaintiffs' own experts have  
 20 identified that.

21           And then, when we turn to the convenience factors,  
 22 they overwhelmingly favor an English forum, Your Honor. There  
 23 is, as Mr. Warnot observed, a requirement for any court  
 24 carrying European law claims, whether that's this court or a  
 25 court in the EU, to decide any number of unresolved issues of

1 European law; issues under the European substantive law,  
 2 issues under national law. Mr. Warnot identified a number of  
 3 them, but they include standard fault that needs to be met to  
 4 recover damages, statute of limitations, whether exemplary  
 5 damages or other forms of damages are available, indirect  
 6 purchaser standing, the pass-on defense, standards for  
 7 causation. All of these arise and many of them are  
 8 unresolved.

9 THE COURT: In English law, too?

10 MR. OGDEN: Many of them, as Mr. Warnot observed,  
 11 are unresolved in English law as they apply to antitrust laws.  
 12 And even the Courage decision was a case in which an English  
 13 rule that limited the rights of a plaintiff who was a  
 14 participant in an illegal agreement to recover, that was a  
 15 rule of English law that the European court of justice set  
 16 aside saying that it interfered with the effective remedy.  
 17 And so, what English law is, how it applies to antitrust  
 18 claims and whether European law requires an adjustment in  
 19 those rules on any number of different respects will need to  
 20 be resolved.

21 Now, but it's clear that whatever the rule would be  
 22 in England as to whether English law governs every claim, it's  
 23 absolutely certain that that would not be the rule in this  
 24 court. This court would have to apply the forums choice of  
 25 law principle, not England's choice of law principle,

1 New York's choice of law principle under well-established  
 2 cases requires an issue-by-issue, claim-by-claim decision as  
 3 to what law governs so that claims of Portuguese shippers,  
 4 shipping between Portugal and Nigeria, would have to be judged  
 5 under an interest-balancing approach that would presumably  
 6 dictate a different law than English shippers shipping from  
 7 England to Russia, depending on the nationality of carrier,  
 8 where the agreement was reached, where the injury occurred. At  
 9 least all three in one jurisdictions of Europe will have their  
 10 laws in play in these European claims under New York choice of  
 11 law principles.

12 And consequently, the choice of law challenges faced  
 13 will be staggering. And even after you've decided what law  
 14 applies, you've got to decide what the law is when in many  
 15 cases it hasn't been squarely decided by that national  
 16 authority. Obviously, that exercise would much better be done  
 17 by a court in the European Union than by a court in the  
 18 United States.

19 Additionally, the location of the evidence here and  
 20 the difficulty of getting access to it will be far greater in  
 21 the United States, the difficulties, than in Europe. Now, the  
 22 plaintiffs have suggested that there are great efficiencies  
 23 potentially that could be obtained by litigating this matter  
 24 jointly; the U.S. and the European claims. But lots of  
 25 evidence is going to be given. These claims involve different

1 routes. They involve different carriers. They involve  
 2 different markets. They involve different forwarders and they  
 3 involve different shippers. All of that different  
 4 constellation is going to generate different analysis with  
 5 potential to impact on the market, damages, pass-on defense  
 6 and a host of issues where there will be individualized proof  
 7 required, and probably with respect to liability to the extent  
 8 that proof extends beyond surcharges to other issues. That's  
 9 going to be decentralized proof that's going to be found round  
 10 the world.

11                   And in consequence of that, big issues will arise  
 12 with respect to the blocking statutes and privacy laws in  
 13 Europe where -- and utilization of the Hague Convention. All  
 14 these requirements, these barriers imposed by European law to  
 15 the U.S. discovery process will be a real problem in this  
 16 context. A much greater problem potentially.

17                   THE COURT: Why greater than if they were over -- if  
 18 it was a, let's posit that there may be required, if this  
 19 court declines jurisdiction, multiple actions in multiple  
 20 different foreign states.

21                   Then won't the same problems occur in terms of  
 22 getting access to records across national boundaries?

23                   MR. OGDEN: The European legal system will allow,  
 24 through its own internal mechanisms, will allow the discovery  
 25 through the mechanisms of the European civil process, and the

1 regulatory system that's administered by the ECJ will allow  
 2 evidence to be obtained from between various different  
 3 entities in the EU. And because this evidence primarily  
 4 concerns travel between the EU and the rest of the world,  
 5 those mechanisms, the respect that the French are required to  
 6 accord to the U.K., or that the Germans are required to accord  
 7 to the Spanish, et cetera, will allow for the normal operation  
 8 of their evidentiary process and the discovery process to  
 9 centralize that information.

10 For this court it will be tough because this court  
 11 would be enforcing European substantive law and would be  
 12 looking at the issue as to whether to override European laws  
 13 that block discovery from the United States. It wouldn't  
 14 block discovery internal to the EU, but would block discovery  
 15 from the United States in the name of European substantive  
 16 law. I think the balance always comes out that European  
 17 procedural limitations would be --

18 THE COURT: All right. I have to limit your time.  
 19 You need to wrap it up.

20 MR. OGDEN: I appreciate that. I just want to  
 21 emphasize two other points.

22 One, is that the judgment from this court if it took  
 23 these cases would very likely not be enforced.

24 THE COURT: Certainly subject to collateral attack.

25 MR. OGDEN: Subject to litigation and substantial

1 attack.

2 And there would be a risk of parallel engaging going  
3 on in Europe that would not be stayed under the principles of  
4 European law.

5 THE COURT: I'm sorry, restate that last?

6 MR. OGDEN: European law, under the modernization  
7 regulation as discussed in the Layton and Smith memorandum,  
8 again at paragraphs 29 to 30, would call for a second file of  
9 case in Europe on the same subject matter; generally to be  
10 stayed in deference to a pending proceeding underway in  
11 another EU country. But according to that affidavit, because  
12 of the rights that a European plaintiff would have to  
13 adjudication of claims under Article 81, they would not stay  
14 that proceeding in favor of this one.

15 THE COURT: Well, have some such proceedings been  
16 filed there?

17 MR. OGDEN: Not at this point. Not at this point.

18 THE COURT: Okay. Thank you.

19 MR. OGDEN: Thank you.

20 THE COURT: Mr. Hausfeld.

21 ARGUMENT IV

22 BY MR. HAUSFELD:

23 MR. HAUSFELD: Good afternoon, Your Honor.

24 THE COURT: Good afternoon.

25 MR. HAUSFELD: Sometimes I find that some bells and

1   whistles can be of assistance, and in this particular case,  
 2   there is an adage about old dogs needing to adapt every once  
 3   in a while. And so, I have adapted to some new technology.  
 4   But likewise, old laws sometimes need to adapt as well.

5                   And as the Second Circuit stated in the Curley  
 6   versus AMR Corporation that the Courts in the Second Circuit  
 7   should be flexible in taking issues relating to the law of  
 8   foreign nations because such issues can be expected to come to  
 9   Federal courts with increasing frequency as the global economy  
 10   expands and cross-border transactions increase. And I think  
 11   both counsel for the defense aptly illustrated the fact that  
 12   this is a case which invokes applying old venerable good law  
 13   to new circumstances.

14                  We've heard from counsel that essentially European  
 15   law is so different from the United States that it would, in  
 16   essence, mire this court in a complexity of decisions which it  
 17   could never extricate itself and assort manageably. They use  
 18   terms such as if this court were to exercise either diversity  
 19   jurisdiction, which they really have no good argument does not  
 20   apply because the plain language of the diversity statute  
 21   grants jurisdiction, or discretionary jurisdiction under  
 22   supplemental authorities.

23                  What they say is that the exercise of any  
 24   jurisdiction by this court over foreign claims in this global  
 25   situation would nullify, frustrate, undermine or overrule

1 European law. I'd like to --

2 THE COURT: Let me tell you what my main concern is.  
 3 And that is that European law does not seem to be that  
 4 well-developed. And there are a number of issues that will  
 5 undoubtedly arise and the typical, the typical reaction in the  
 6 Second Circuit to that is when there's a State law that we're  
 7 asked to interpret or asked to pass on, where there's been no  
 8 real authority and it's a real serious question, we send it  
 9 off on certification. And we don't have that possibility  
 10 here.

11 And it really does trouble me that this court will  
 12 be basically announcing principles of general application  
 13 throughout Europe and having no real slate to write on. I  
 14 mean, we would basically be taking affidavit after affidavit  
 15 from foreign law experts who would only be opining based on  
 16 what they think the European community is going to do because  
 17 there's no law out there upon which to rest their decision.  
 18 And it just doesn't seem like a particularly -- it just  
 19 doesn't seem like an exercise that this court ought to jump  
 20 into.

21 MR. HAUSFELD: I would agree, Your Honor. Except if  
 22 you accept that reasoning, if there's really no law, then  
 23 there can't be an adequate forum. The issue --

24 THE COURT: No, no. There is an adequate forum to  
 25 decide these new principles. I mean, these principles that

1 need development. And the adequate forum is over there where  
 2 the law is, where the European community, you know, enacted  
 3 the treaty and set up the legal structure.

4 MR. HAUSFELD: And if I could request Your Honor's  
 5 indulgence --

6 THE COURT: Okay.

7 MR. HAUSFELD: -- in making a distinction between  
 8 process and substance.

9 There is no ambiguity with regard to the substance  
 10 of European competition law. There is underdevelopment in  
 11 terms of the process which is desired to be constructed to  
 12 achieve the objective, but the objective is unequivocal.

13 THE COURT: But how to achieve the objective? I  
 14 don't know whether you want to call it process or substantive,  
 15 they're two different things. You know, the objective is to  
 16 eliminate price fixing as far as it makes sense, I suppose.

17 That's what you would say; right?

18 MR. HAUSFELD: Yes, but I think two events have  
 19 occurred that assist this court in understanding how U.S.  
 20 litigation involving European claims in particular applying  
 21 European law can bridge that gap.

22 THE COURT: Okay.

23 MR. HAUSFELD: Let's look at the policy in Europe,  
 24 which we claim is extremely clear.

25 Every citizen has a right to compensation for harm

1 suffered as a result of an infringement of European law.  
 2 That's guaranteed by community law for every member state  
 3 throughout the entirety of the union. What the European  
 4 Commission, which is the chief judicial body in essence for  
 5 policy determination for the entirety of the union says, that  
 6 private right are an essential complement to public  
 7 enforcement and that private enforcement has to be real.  
 8 Rights that cannot be enforced and enforced effectively, it is  
 9 noted throughout Europe, are not rights at all.

10 So, what has the European community told us with  
 11 regard to infringements of their competition law? It says  
 12 that community law demands an effective system for damages,  
 13 but at this point in time the law within the member states is  
 14 underdeveloped.

15 Why is it underdeveloped? Because there are situations  
 16 in which the victims of a cartel -- and the victims of a  
 17 cartel, Your Honor, are all purchasers in the market infected  
 18 by the cartel. Infringements of European competition law for  
 19 price fixing are no different than price fixing under  
 20 Section 1 of the Sherman Act. They are combinations of  
 21 enterprises or companies which manipulate and interfere with  
 22 the free market. Not just the market of one purchaser, but of  
 23 the entirety of the market. So, a price fixing cartel or  
 24 conspiracy impacts all purchasers in the market.

25 And what the European Commission says, and is the

1 law throughout the European Union, if you have a cartel which  
 2 infects a market, it impacts all purchasers in that market,  
 3 and you have to have an effective system which allows all  
 4 those purchasers in the market to retrieve what was taken from  
 5 them by the cartel.

6 So, what else do we see about the policy so that  
 7 there's no ambiguity, Your Honor, in terms of what Europe  
 8 seeks to achieve and what it is that they need to construct in  
 9 order to achieve what they seek?

10 The union has said that they must ensure in this  
 11 increasingly complex and interconnected world that their  
 12 national civil justice systems are able to effectively respond  
 13 to disputes which cross national boundaries. A recognition by  
 14 itself, Your Honor, that judicial systems in any member state  
 15 must reach to those transactions which may originate outside  
 16 their boundaries and affect their citizens within their  
 17 boundaries as well as citizens of other states.

18 And so, the European Commission unequivocally states  
 19 that, faced with global problems, we need to design truly  
 20 global solutions; the antithesis of having each member state  
 21 decide within the judicial system of that member state and  
 22 that member state alone the impacts of a global cartel which  
 23 affect not only the members of those individual member states,  
 24 but as well the citizens of other states on other continents.

25 So, what is it that the commission tells us at this

1 point is the policy unequivocally throughout the European  
 2 Union for all member states? It says: Collective redress  
 3 mechanisms are an absolute must. Not discretionary. Not to  
 4 be debated, but are a must. If you're going to devise and  
 5 design and construct a global solution to a global problem,  
 6 there has to be a collective mechanism. Individual suits by  
 7 individuals pursuing individual relief is insufficient.  
 8 Ineffective.

9                   But now, Your Honor, we come to the issue that you  
 10 raise; what does the European Union recognize? Well, right  
 11 now they say the hurdles are too great. Our system is too  
 12 ineffective. We cannot achieve the desired unequivocal  
 13 unambiguous objective of providing the right to every victim  
 14 of an infringement of European law the compensation to which  
 15 it is entitled. And they are not shameful, nor are they  
 16 difficult in stating their objective. The primary objective  
 17 of European law, particularly with regard to infringements of  
 18 Article 81, price fixing cartels, is full compensation for all  
 19 damages suffered as a result of the European Commission  
 20 anti trust rules.

21                   And we see within the European Union an  
 22 understanding of the interaction of global economic force.  
 23 What they advocate, what they acknowledge, what they seek to  
 24 achieve is coherence in competition law and enforcement around  
 25 the globe. Not compartmentalization, not each member state

1 deciding its interpretation of an unambiguous law. Price  
 2 fixing is price fixing in every member state. Price fixing is  
 3 equally prohibited in the United States and is no different  
 4 than price fixing infringements in each of the member states  
 5 of the union.

6 THE COURT: The one, I think I know where you're  
 7 going with your presentation, Mr. Hausfeld. But I must tell  
 8 you, you quote a good deal from the white paper and you quote  
 9 from some individuals who are at the Commission. But that  
 10 announcement of the Commission or of some small group of  
 11 people who have goals that they would like to set for the  
 12 European Union and the European Commission is not a  
 13 commandment for this court to act. It's a commandment maybe  
 14 for the European community to do what it has to do to provide  
 15 those mechanisms.

16 But it seems to me that as far as I understand the  
 17 way that the European treaty works is that the, the treaty  
 18 announces the objectives or the law that's to be, the law that  
 19 should be applied and then leaves it to the member states to  
 20 actually provide an enforcement mechanism. And it's not for  
 21 the, it doesn't seem like it's for the United States to now  
 22 decide for each of those member states the enforcement  
 23 mechanism to apply.

24 And to the extent that a more robust and collective  
 25 mechanism is to be provided, that's a question for the

1 European community to do, not for this court.

2 MR. HAUSFELD: I take Your Honor's question as the  
 3 underpinning of the difficulty in making the connection  
 4 between European law and U.S. law and the rights of foreign  
 5 purchasers to seek justice in a U.S. court for violations of  
 6 those laws. And let me make that connection, if I can.

7 When you say the fact that Europe has an unequivocal  
 8 unambiguous objective which they seek to construct is -- and I  
 9 think I wrote this down accurately -- is not a commandment to  
 10 this court to act.

11 THE COURT: Or any court here, for that matter.

12 MR. HAUSFELD: That's not our position, Your Honor.

13 But it is our position that the fact that there are  
 14 those laws which are unequivocal and unambiguous and direct in  
 15 terms of the objective they seek, which coincide precisely  
 16 with the laws of this country, is not a reason not to act if  
 17 the Court otherwise has the ability to act. That's the  
 18 difference.

19 THE COURT: Well, the problem is, though, it's taken  
 20 us a hundred years to develop the antitrust law here; right?

21 And so, what you're asking is -- because they have  
 22 announced some similar objectives that we now import our  
 23 conception of how to deal with antitrust problems and you  
 24 know, and use that as the model for developing their law in  
 25 this area.

1 MR. HAUSFELD: No. And I say no to that quickly,  
2 Your Honor, because what you just asked --

3 THE COURT: How can it be otherwise? What else are  
4 we going to rely on?

5 I'll let you finish answering.

6 MR. HAUSFELD: I appreciate it, Your Honor, because  
7 you're precisely at the critical question upon which the  
8 assertion of jurisdiction essentially pivots.

9 What I tried to establish is that there is no  
10 uncertainty in the substance of European law.

11 THE COURT: What about the -- let's take one aspect.  
12 Let me just interrupt you for a moment.

13 MR. HAUSFELD: Yes.

14 THE COURT: The pass-through defense. Indirect  
15 purchaser. What about that?

16 MR. HAUSFELD: I intend to get to all of that and  
17 show you how courts in the United States have already  
18 successfully dealt with each and every issue raised by the  
19 defense with regard to the uncertainties of European law.

20 Because the white paper not only gave objectives for  
21 policy in terms of what is an infringement, but they clearly  
22 stated what the law of the European Union must be.

23 THE COURT: But not what it is.

24 MR. HAUSFELD: Excuse me?

25 THE COURT: But not what it is. The European

1 Commission is not the -- I mean, the white paper is not the  
 2 statement of the law; is it?

3 MR. HAUSFELD: Yes, it is. Because the flip-side  
 4 is: Is there precedent that says no, this is not the law.

5 THE COURT: I'm sorry, say that again?

6 MR. HAUSFELD: The flip-side.

7 THE COURT: There's no precedent to say otherwise.

8 MR. HAUSFELD: Exactly. And what the, under the  
 9 treaty Rowe, which formed the union and its regulations, they  
 10 are no longer a loose confederation of independent states with  
 11 respect to most purposes. There is a unity. And there's what  
 12 they call the Principle of Effectiveness.

13 And under the Principle of Effectiveness no member  
 14 state can fail to provide effective relief to any law applying  
 15 to the entirety of the union. So, by establishing its  
 16 principles, it sets forth in parameters this is the law that  
 17 each member state must follow.

18 THE COURT: But then if they say they need a  
 19 collective action, why doesn't everybody, why aren't all the  
 20 states providing the collective action like a class action  
 21 here?

22 MR. HAUSFELD: First of all, the white paper just  
 23 came out last week.

24 THE COURT: Well, maybe --

25 MR. HAUSFELD: Second of all, Your Honor, again if I

1 proceed, I think you will see how this all develops consistent  
2 with that construction --

3 THE COURT: Okay.

4 MR. HAUSFELD: -- of an effective system within the  
5 union.

6 THE COURT: I am interested in the arguments about  
7 how American law jurisprudence has already developed the  
8 European community law with respect to pass-through defenses  
9 and indirect purchaser rights.

10 I mean, are there specific cases that have dealt  
11 with that?

12 MR. HAUSFELD: Yes, if I can?

13 THE COURT: Okay.

14 MR. HAUSFELD: Under EU practice and policy, this is  
15 the law at this point throughout the union; that a victim of  
16 competition law infringements has to be fully compensated, not  
17 treble damages, not double damages, single damages, but with  
18 the right of pre-judgment interest.

19 Just last Friday in the United States District Court  
20 in the Northern District of California, Judge Brier entered an  
21 order approving a settlement of a claim by British citizens  
22 against Virgin Atlantic and British Airways for fixing the  
23 prices of fuel surcharges on passenger flights from the U.K.  
24 to destinations other than the U.S. .

25 What was most instructive is Justice Brier had no

1 difficulty, neither did the defendant, in saying that the very  
 2 same conduct which violated United States law also violated  
 3 European law. Same set of facts.

4 What the Court did as well in that case is approve a  
 5 settlement that was consistent with European law. The  
 6 United States class of those passengers that flew Virgin  
 7 Atlantic and British Airways was an opt-out mechanism. The  
 8 European class, the U.K. class, was opt-in. So, only those  
 9 passengers that affirmatively opt into the class, consistent  
 10 with the present process in the U.K. and elsewhere throughout  
 11 the union, would be permitted essentially to participate.

12 That solves a lot of problems, Your Honor. It  
 13 solves the problems of there not being a New York law which  
 14 authorizes class actions as an opt-out. We're not asking for  
 15 an opt-out. As Judge Brier determined, an opt-in mechanism  
 16 was permissible and consistent with European law, and that was  
 17 what was ordered. It also addresses the issue of  
 18 enforceability because if those persons who become part of the  
 19 litigation are only those who opt-in and affirmatively elect  
 20 to be bound by a judgment, there is no question that the  
 21 judgment of the U.S. court will be challenged outside the  
 22 United States as being unenforceable.

23 Lekwi se --

24 THE COURT: I'm sorry, there's no question that it  
 25 won't be challenged?

## Argument IV / Mr. Hausfeld

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1 MR. HAUSFELD: Yes.

2 THE COURT: Okay. Right. That's what I thought you  
 3 said, okay.

4 MR. HAUSFELD: And likewise, there is no difficulty  
 5 in there being an affront to European law because the damages  
 6 that were made available to the non-U.S. passengers were  
 7 single damages. There were no double damages asked for, no  
 8 treble damages asked for; just damages, consistent with  
 9 prevailing European law.

10 By the way, slide 17 outlines the approach that was  
 11 taken with regard to the British Airways/Virgin Atlantic  
 12 settlement and the ability of the Court to accept jurisdiction  
 13 and make the distinctions that we just spoke of, consistent  
 14 with both the application of U.S. law and EU law.

15 (The above-referred to slide was published to the  
 16 courtroom.)

17 Now, defendants raise the issue of indirect standing  
 18 and pass-on, which is also a matter of allocation. Who has  
 19 standing to sue what the damages in terms of the chain of  
 20 distribution and how do you make that allocation?

21 Well, the European Union presently has a practice  
 22 that says indirect purchasers should be able to rely on the  
 23 rebuttable presumption that the illegal overcharge was passed  
 24 on to them in its entirety.

25 First of all, Your Honor, an indirect purchaser

1 purchases damage or injury derivative of the direct  
 2 purchaser's injury. The two combined can never exceed that of  
 3 the impact on the market as a whole. The impact in the market  
 4 is a hundred percent. Usually, the first purchaser bears the  
 5 entirety and then it may get passed on down the chain of  
 6 distribution.

7 So, within the European Union indirect purchasers  
 8 have an equal right to at least allege an injury derived from  
 9 the first purchase in a market impacted or infringed by a  
 10 cartel. But the union specifically states, and it is the  
 11 preference throughout the union that issues regarding  
 12 allocation be determined by mechanisms such as arbitration or  
 13 mediation between the parties seeking the allocation from the  
 14 fund.

15 In other words, once the market impact is  
 16 determined, the defendants' rights are concluded and it's a  
 17 matter of, as between the direct and indirect purchasers in  
 18 the chain of distribution of who is entitled to that.

19 THE COURT: Let me, can I switch you off this  
 20 subject? I mean, it sounds like it seems to me I'm getting an  
 21 education in European Commission law, which sort of gets past  
 22 the --

23 MR. HAUSFELD: Next slide Your Honor?

24 THE COURT: Well, one of the questions that was  
 25 raised by the defendants was whether the claims here are going

1 to be determined by English law or not. It seems like the  
 2 claims are asserted under English law.

3 Are they accurate? Are they right about that?

4 MR. HAUSFELD: Claims can be asserted under English  
 5 law looking to see whether there was a forum, but the claims  
 6 are essentially asserted under EU law. Was there an  
 7 infringement of Article 81 prohibiting price fixing cartels?  
 8 That is the single law which applies uniformly throughout all  
 9 member states in the European Union.

10 THE COURT: But could they all be adjudicated, then,  
 11 in one forum?

12 MR. HAUSFELD: Absolutely.

13 THE COURT: And then, why isn't that an adequate  
 14 alternative forum, then?

15 MR. HAUSFELD: If I could get to that in a second?  
 16 I would like to give the Court the example of what occurred in  
 17 this litigation.

18 THE COURT: But this litigation we're talking about,  
 19 this isn't the context of a settlement, and that's not as  
 20 instructive to me as what's going to happen in a, we're not --  
 21 maybe we'll get a settlement. We've already got one, so it's  
 22 possible I suppose we'll have a settlement down the line.

23 But I guess I'm not as, the finding by Judge Brier  
 24 that he could approve a settlement of, I guess, it's -- you're  
 25 saying he's approving a settlement of EU, of EC treaty. Or

1 EU. Is it EC treaty? The EC treaty claims.

2 MR. HAUSFELD: Yes.

3 THE COURT: It is not whether this court can  
 4 adjudicate disputes about or should adjudicate disputes  
 5 involving European law.

6 MR. HAUSFELD: That's a fundamental difference and  
 7 I'd like to get to that in a moment.

8 After we say what happened in this court, not as an  
 9 indication of what would happen in Europe, but of the fact  
 10 that using the same mechanisms that would be available in  
 11 Europe, this court has already addressed the issue of pass-on  
 12 allocation because there was a determination by a mediator  
 13 with respect to the damages that different levels of  
 14 purchasers in the chain of distribution could and should  
 15 recover.

16 THE COURT: You're talking about in connection with  
 17 the Lufthansa settlement.

18 MR. HAUSFELD: Yes.

19 THE COURT: All right.

20 MR. HAUSFELD: But if there's a judgment,  
 21 Your Honor, we're going to involve, we're going to need to  
 22 involve the same mechanism. And that is: Can we mediate  
 23 that? And that's what Europe says should be done.

24 So, we're looking to see, what is it that remains  
 25 outstanding that this court is at least urged not to do

1 because it can't do when, in fact, other courts, both this  
 2 court and the Northern District of California have already  
 3 done.

4 THE COURT: But that's when the parties have agreed  
 5 to that. I mean, that's just, it's a different circumstance  
 6 in my mind between finding a mechanism for distributing a  
 7 settlement versus, you know, adjudicating all the disputes  
 8 that are going to occur in connection with the litigation.

9 I mean, it's a lot. As you said, we don't have to  
 10 worry about whether those people who opt-in are going to  
 11 challenge anything that's done here in a foreign jurisdiction.  
 12 If this case is actively litigated, which at this point I have  
 13 to assume it will be, this court will be asked to decide a  
 14 myriad number of questions of European community law, which we  
 15 are going to say is binding on the parties before us, but  
 16 which are announcing principles of application in Europe.

17 MR. HAUSFELD: Can I, again --

18 THE COURT: Let me can you a question: Of what  
 19 authority is the settlement here regarding any of these issues  
 20 going to -- I mean, is the European Commission looking to what  
 21 the United States does with European community antitrust  
 22 claims?

23 MR. HAUSFELD: If I can separate a difficult  
 24 concept? And that is, this court acting beyond its authority  
 25 to reach out to do something which it otherwise doesn't have

1 the authority to do.

2 THE COURT: Okay. It's not so much that.

3 MR. HAUSFELD: Okay, then.

4 THE COURT: I'm not really challenging whether the  
5 Court could decide issues of foreign law. The Court can.

6 MR. HAUSFELD: Yes.

7 THE COURT: It's whether it should.

8 MR. HAUSFELD: Okay. Now, let's stop right there.  
9 Whether it should.

10 First of all, under diversity jurisdiction, under  
11 the plain language. And even the defendants don't make much  
12 of this other than to say well, we should ignore the plain  
13 language. This court has mandatory diversity jurisdiction.  
14 That, in essence, puts it in the position of applying foreign  
15 law to a litigation that it already has legitimate original  
16 jurisdiction.

17 Now, the issue then becomes discretionary  
18 jurisdiction under supplemental. But I'd like to hold off on  
19 that for just a moment and get to the heart of what I believe  
20 is Your Honor's concerns.

21 What would you need to decide in foreign law that  
22 would be novel with respect to that foreign law? Under  
23 United States law, Your Honor's going to be deciding whether  
24 or not there was a global conspiracy to fix prices which  
25 impacted U.S. commerce, whether that includes commerce to the

1 United States as well as from the United States. That is an  
 2 issue you have to decide.

3 With regard to foreign law under the treaty of Rowe,  
 4 you have to decide whether there was a price fixing cartel  
 5 which violated Article 81. The same issue. There's nothing  
 6 novel. Would you have to decide, as the defendant said,  
 7 issues of passing on? Well, technically, you wouldn't.  
 8 Because what you could do is decide the issues of liability  
 9 and then send the remaining case back to Europe, if you  
 10 wanted, for an allocation. But you also could decide issues  
 11 of allocation using the same processes that Europe prefers in  
 12 terms of mediation and arbitration.

13 You wouldn't be deciding an opt-out class action  
 14 because we're willing, as Judge Brier did, to make the  
 15 distinction and say okay, if that's the objection to applying  
 16 a uniform clear infringement violation of European law in the  
 17 United States, we'll have the same process. An opt-in class.  
 18 Only those who determine to come into this litigation to avail  
 19 themselves of this forum, a single forum in which their claims  
 20 can be litigated, doesn't violate any European principle.

21 Likewise, in adopting an opt-in process, there's no  
 22 issue of enforceability, of a U.S. judgment on absent class  
 23 members outside the United States, because there are none.  
 24 Only those who affirmatively opt-in to the U.S. litigation are  
 25 bound. Anyone who doesn't opt-in is free to do what they want

1 at any time. They're not bound by anything, nor are they  
 2 prohibited from filing a case elsewhere. So, that's not a  
 3 limitation.

4 There's no standing question because we have both  
 5 direct and indirect foreign purchasers here. Whatever the  
 6 rule is with regard to standing that is claimed not to have  
 7 been worked out, which we believe the European Commission has  
 8 made clear is an entitlement to all levels of distribution, is  
 9 not an issue because there are both parties present.

10 And the last thing that they raise is attorney's  
 11 fees in terms of contingencies. Well, if there is no opt-out  
 12 class, we're not going to be requesting attorney's fees which  
 13 would diminish the recovery to the class. We'll adopt the  
 14 European rule that if we prevail, the those who opt-in get  
 15 their full damage, and attorney's fees and expenses are added  
 16 on top.

17 So, I don't believe that there's any issue  
 18 practically that faces this court which is not manageable and  
 19 which is not consistent both with the application of U.S. law  
 20 to the U.S. class and European law to those European  
 21 businesses or persons who choose to opt-in to the U.S.  
 22 litigation.

23 THE COURT: Let's assume that the claims, in fact,  
 24 will proceed under -- you said they proceed under Article 81.

25 MR. HAUSFELD: Yes.

1                   THE COURT: But somehow there's an English component  
 2 to this and I'm not sure I follow exactly what that is.

3                   Is it procedural?

4                   MR. HAUSFELD: Within each member state there are  
 5 separate national rules for infringements.

6                   THE COURT: Okay. So, you would rely on the English  
 7 one?

8                   MR. HAUSFELD: No. At this point, Your Honor,  
 9 because the white paper has made it so clear that there is a  
 10 single overriding substantive law with regard to infringements  
 11 of Article 81 by price fixing cartels, that is what we rely  
 12 on.

13                  THE COURT: So, is it your position that you could  
 14 assert an Article 81 claim in any court in Europe that would  
 15 reach all transactions touching the European Union?

16                  MR. HAUSFELD: The difficulty with that statement,  
 17 Your Honor, is I don't know if I could get jurisdiction over  
 18 all of the defendants in every member state. But ideally, if  
 19 I could, a judgment, a judgment that there was an infringement  
 20 of Article 81 by numbers of companies would be applicable  
 21 throughout the European Union. And the example I'd like to  
 22 cite to Your Honor is the European Commission's statement of  
 23 objections.

24                  That statement, which I think defense counsel opened  
 25 the door to in saying we could not state a claim for violation

1 of European law, is several hundred pages long. It details  
 2 date, time, place, persons in attendance, what was said, what  
 3 was not said. And --

4 THE COURT: I'm not sure I know what you're  
 5 referring to.

6 MR. HAUSFELD: In the European Union, the European  
 7 Commission, which is like our Department of Justice Antitrust  
 8 Division.

9 THE COURT: Right.

10 MR. HAUSFELD: Instead of issuing an indictment,  
 11 issues a statement of objections.

12 THE COURT: Okay. So, as to this price fixing.

13 MR. HAUSFELD: As to this cartel.

14 THE COURT: Right.

15 MR. HAUSFELD: And they outline all of the acts  
 16 which constituted an infringement or violation of Article 81  
 17 throughout the entirety of the union by all of the companies  
 18 that were named in that statement of objections. That would  
 19 be our statement of the claim. That statement of objections  
 20 is binding in all member states. That statement of objections  
 21 states that for all members of states there was a violation of  
 22 Article 81 by those companies named in that statement of  
 23 objections.

24 So, there is a singularity to the infringement by  
 25 the defendant in all member states which constitutes a single

1 violation of a single law. That's what Your Honor would be  
 2 applying under either diversity jurisdiction or under  
 3 supplemental jurisdiction.

4 THE COURT: Okay.

5 MR. HAUSFELD: If Your Honor has any questions on  
 6 comity, I'd like to address that since regrettably it's been  
 7 the case that our office has been principally involved in the  
 8 making of some of the law on comity in the last ten years.

9 THE COURT: Let's see. No, I don't think there's  
 10 anything.

11 MR. HAUSFELD: Defense counsel is correct. There  
 12 are two aspects to comity. There's comity in terms of  
 13 conflict of laws and I think, as conceded by defense counsel  
 14 this afternoon, there is no conflict of law.

15 THE COURT: Right. I would like you, I'm glad you  
 16 picked up on that. Their argument is that that's not --  
 17 they're not arguing under that strand.

18 They argue that there's a different strand of the  
 19 comity doctrine that they're relying on, and particularly  
 20 point to Biggio. So, yes, address that, if you will.

21 MR. HAUSFELD: So, there is no conflict of law which  
 22 is significant because in saying there is no conflict of law,  
 23 Your Honor, that's an admission that there is a confluence of  
 24 law. Or a harmony or a convergence in the law. The law in  
 25 the EU, Article 81, is the same as Section 1. The conspiracy

1 to price fix in violation of Section 1 of the Sherman Act is  
2 the same cartel which infringed the terms of Article 81 of the  
3 European treaty. So, then we go to the concept of comity in  
4 courts. Let's look at the cases which are cited by the  
5 defendants.

6 The first is the Ivanova versus Ford Motor case  
7 involving German forced enslaved laborers. And what the Court  
8 says in relation to comity is that a U.S. court should not  
9 interfere with a foreign sovereign's pronouncements of its  
10 law.

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12 (Continued on following page.)

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## 1 ARGUMENT IV

2 MR. HAUSFELD

3 MR. HAUSFELD: (Continuing) In the hundreds of pages  
 4 of arguments that have been made by defendants in writing and  
 5 of the time expended this afternoon by the defendants, they  
 6 have not identified one pronouncement of EU Law that would be  
 7 interfered with by a decision by this court; that the price  
 8 fixing cartel engaged in by these defendants was not equally a  
 9 violation of Section 1 as well as Article 81 of The European  
 10 Code.

11 The second aspect of comity, of course, was  
 12 whether or not a decision by a U.S. court would disrupt a  
 13 foreign procedure in place for the resolution of the claims  
 14 being sought to be litigated in a U.S. court. That's very  
 15 significant, because we just heard Mr. Ogden say that there is  
 16 no litigation right now in place in Europe, so there could be  
 17 no disruption of any foreign procedures.

18 There is no present case on file in Europe  
 19 which this court would disrupt and there is no foreign  
 20 pronouncement of law that would be interfered with. And this  
 21 court, in terms of what the Second Circuit has said, almost  
 22 using the identical words issued by the European Union that  
 23 "Federal courts should expect with increasing frequency to  
 24 apply foreign law as global economies expand and cross border  
 25 transactions increase."

Argument IV - Mr. Warnot

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1 THE COURT: I'm going to have to ask you to wrap it  
2 up, Mr. Hausfeld.

3 MR. HAUSFELD: Actually that was --

4 THE COURT: That wrapped it up.

5 MR. HAUSFELD: That was my wrap up, Your Honor.

6 THE COURT: I'm going to let either Mr. Ogden or  
7 Mr. Warnot react to this to the impact of the opt-in opt-out  
8 issue. The opt-in opt-out option, let's call it that.

9 ARGUMENT IV

10 BY MR. WARNOT

11 MR. WARNOT: I will make just a couple of points  
12 from here if that's okay, Your Honor?

13 THE COURT: Okay.

14 MR. WARNOT: First of all, the White Paper is not  
15 European Law. It's no more European Law than the report of  
16 the Antitrust Modernization Committee is U.S. Law. If you  
17 look at Mr. Basedow's affidavit, it specifies the various  
18 sources of European Law and the White Paper certainly isn't  
19 one of them.

20 THE COURT: Could you give me your take of what the  
21 interrelationship is between the European Commission and the  
22 various member states in terms of announcing law and in terms  
23 of, you know, what can and cannot the EC do in terms of  
24 requiring member states to quote, "Provide an effective  
25 remedy."

1                   MR. WARNOT: Well, The European Court of Justice has  
 2 said that, "The member states must provide," they must enforce  
 3 Article 81. What can be done at the Commission level is to  
 4 legislate; and once the Commission legislates, that's binding  
 5 on the member states. Opinions and recommendations are not  
 6 binding on the member states.

7                   THE COURT: Okay. It's a legislative body as well.

8                   MR. WARNOT: Not the Commission, the community as a  
 9 whole. There is a legislature. The Commission is more like  
 10 the Executive. Then, the member states have to effectuate  
 11 regulations when they're enacted into law and if there is a  
 12 dispute as to whether, in fact, it's being done right you go  
 13 up to The European Court of Justice. Any European court,  
 14 whether it's an appellate court or trial court, has the option  
 15 to seek an opinion from The European Court of Justice.

16                   THE COURT: You mean any member state's court?

17                   MR. WARNOT: Yes. The way that the law will be  
 18 developed in the European Law is the way the law gets  
 19 developed here. You have cases; the cases go up on appeal  
 20 where necessary. You go to The European Court of Justice to  
 21 get opinions on various points of law. With the way to make  
 22 sure the law stays completely undeveloped is to give European  
 23 plaintiffs a forum in the U.S. where they can have a jury  
 24 trial and contingency fees and broad discovery, all the things  
 25 that go along with litigation and why would they stay in

## Argument IV - Mr. Warnot

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1 Europe if they can just come here. Of course, that's not what  
 2 the U.S. judicial system is about.

3 The excerpt that Mr. Hausfeld showed you from  
 4 the Virginia stipulation neglected to include the various  
 5 language that's in the following paragraph of that  
 6 stipulation.

7 "Notwithstanding the stipulation contained in  
 8 Paragraph 4, which refers to above, both plaintiffs and Virginia  
 9 Atlantic agree that such stipulation is not a concession that  
 10 this court or any court in the United States has jurisdiction  
 11 over claims arising under the laws of any nation or  
 12 jurisdiction other than the United States."

13 That's Exhibit 7 of the plaintiff's brief.

14 Let me make just a couple of other points.

15 The test on comity according to Biggio whether  
 16 it would effect amicable working relationships with another  
 17 sovereign. We haven't admitted there is no conflict.

18 As Your Honor rightly pointed out, the point  
 19 that we made that's not the question in the application of the  
 20 comity analysis in the Iguanowa case. The issue there was  
 21 interfering with pronouncements of a foreign sovereign. Well,  
 22 here we have lots of pronouncements from the European  
 23 Commission as set forth in our papers as to what they're  
 24 trying to do to develop private rights of action for  
 25 Competition Law in the European community and we've set forth

Argument IV - Mr. Ogden

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1 in our papers all the ways that this court, taking  
2 jurisdiction over this case, would interfere with that and I  
3 think those are the only points I can make.

4 THE COURT: All right. Mr. Ogden.

5 ARGUMENT IV

6 MR. OGDEN

7 MR. OGDEN: Couple of things, Your Honor.

8 First, a little bit more about the interplay  
9 because I think it really is very important between European  
10 Law and National Law and how that functions.

11 European Law and Article 81 provides the  
12 question as to whether there was a violation of substantive  
13 law. But all of the other laws that relate to civil damages  
14 recovery is to be supplied by National Law.

15 THE COURT: Including -- one thing that occurred to  
16 me what about sufficiency evidence to establish.

17 MR. OGDEN: Exactly.

18 THE COURT: Is that something that would be  
19 relegated to the member states?

20 MR. OGDEN: Yes. So that the standard of proof, for  
21 example, in different states in Europe includes a probability  
22 standard, high degree of probability standard, beyond a  
23 reasonable doubt standard, there are a variety of them. And  
24 on the face of it, that question would be entrusted to the  
25 national courts to develop and apply their rules. They're

1       obligated to have an equivalence.

2                   There, is in addition to the effectiveness  
 3 principle, there is an equivalence principle. So, there is an  
 4 obligation for the national state to record to European Laws  
 5 an equivalent rule to the one they apply to cognate similar  
 6 kinds of Laws. So that procedure is applied that is in turn  
 7 subject to this requirement of effectiveness.

8                   So, presumptively National Law on fault,  
 9 statute of limitations, damages; what categories of damages  
 10 are available, the standard of proof as we just discussed,  
 11 issues of standing like indirect purchaser standing, the  
 12 availability of a pass-on defense, a causation standard as to  
 13 whether it's direct or but for, et cetera. Attorneys fees.  
 14 All of those are presumptively subject to National Law  
 15 enforcement.

16                   Now, there is an appeal which a plaintiff can  
 17 take if a plaintiff doesn't think that the remedy provided by  
 18 National Law or the procedure or the subsidiary set of rules  
 19 which obviously are some of them substantive, some of them  
 20 procedural. If they don't afford an effective remedy, they  
 21 can take that question to The European Court of Justice. Any  
 22 national court, the trial level court, the lowest court to the  
 23 highest court, can send a question of European Law to The  
 24 European Court of Justice.

25                   THE COURT: The Court can as well as the litigants?

1                   MR. OGDEN: The court may send it at the lower  
 2 level; the litigants could certainly request that. When the  
 3 litigants appeal to the highest court, there is a mandatory  
 4 referral to The European Court of Justice to decide issues of  
 5 European Law and it's in the context of that type of appeal  
 6 like you get the Courage v. Crayhan case where The European  
 7 Court of Justice said that the British law which disabled a  
 8 person who entered into an illegal agreement from suing about  
 9 its violating antitrust law had to be set aside because it  
 10 denied an effective legal remedy. There is a subvening  
 11 federal, if you will, obligation that the ECJ enforces that  
 12 remedies be effective. But subject to that, National Law  
 13 supplies the rule.

14                   THE COURT: You said something about comparable.

15                   MR. OGDEN: There is a Rule of Equivalency which is  
 16 the other principle that's talked about in the affidavits, the  
 17 expert affidavits, that Your Honor has many pages of which  
 18 talks about the requirement.

19                   England can't provide a less generous rule to a  
 20 plaintiff suing under EU Law than it provides to a plaintiff  
 21 suing under English Competition Law, that's the Rule of  
 22 Equivalency. Then, there's the Rule of Effectiveness that  
 23 says, "Even if you give the equivalent rule, it has to be  
 24 effective," and it's that mandate that the European courts,  
 25 The European Court of Justice, will be working out in the

1 context of suggestions of the White Paper; and in the context  
 2 of policy arguments, get made by the European Commission. The  
 3 courts are going to implement this and this is mandate of  
 4 effectiveness.

5 I did also want to observe it is true there are  
 6 no cases presently in European courts; that's because the  
 7 European Commission currently has under consideration this  
 8 very matter. It's deciding whether it's going to adjudicate a  
 9 violation and once it does that, Your Honor, that will trigger  
 10 the right to file lawsuits in national courts and if there is  
 11 a determination of a violation that --

12 THE COURT: You've lost me a little bit. What's the  
 13 issue that's under consideration?

14 MR. OGDEN: The European Commission is not just  
 15 anti trust division, it actually adjudicates violations of law,  
 16 and it currently has under consideration a Statement of  
 17 Objections against these defendants, many of these same  
 18 defendants, in which it's going to determine whether Article  
 19 81 was violated.

20 THE COURT: Okay.

21 MR. OGDEN: When it makes that determination, that  
 22 determination will be binding on all European courts; and at  
 23 that point, civil damages actions can be brought that will be  
 24 based on that determination by the EC that there's a  
 25 violation.

1 Mr. Hausfeld has suggested one possible way to  
2 go. There would be for this court to just adjudicate a  
3 violation of Article 81 and leave the damages to the National  
4 Courts of Europe but that's exactly what the European  
5 Commission is doing right now. There is no need for this  
6 court to adjudicate these issues to create a determination of  
7 a violation of Article 81 because the European Commission,  
8 believe it or not, actually is proceeding to enforce European  
9 Law at the present time which will trigger that exact process  
10 without this court's assistance.

11 THE COURT: Okay.

12 MR. OGDEN: So, for all of these reasons, Your  
13 Honor, we think that this court should let a right of  
14 effectiveness that Mr. Hausfeld has so accurately described be  
15 enforced by European courts. We think they're fully capable  
16 of doing so and there is no reason this court should continue  
17 to entertain this action.

18 MR. HAUSFELD: May I Your Honor.

19 ARGUMENT I V

20 BY MR. HAUSFELD

21 THE COURT: Okay, one minute.

22 MR. HAUSFELD: I will try.

23 They're correct that the European member states  
24 must enforce Article 81. There is no question, and Article 81  
25 is simple: Was there a price-fixing cartel which infringed

1 that article. Same issue as is here substantially identical.  
 2 They're somewhat incorrect or it's interesting with regard to  
 3 the Statement of Objections. The Statement of Objections is  
 4 greater than an indictment in the eight years that the  
 5 commission has issued Statement of Objections. Less than one  
 6 percent of those Statement of Objections has that statement  
 7 not been reduced to a final judgment and in essence equivalent  
 8 to an indictment of the defendants.

9                   So, the sufficiency of the evidence and the  
 10 causation with respect to the fact of infringement is  
 11 literally already established. But, we can live with no jury  
 12 in the United States as well if that's what they're concerned  
 13 about as opposed to what it is that they're really seeking,  
 14 because what they are saying is this court may take  
 15 jurisdiction or has jurisdiction under diversity and may take  
 16 jurisdiction under comity but it should leave foreign law to  
 17 development in foreign nations, while, at this very time, they  
 18 concede there is no forum which would effectively redress the  
 19 damage which has been caused by the cartel which caused an  
 20 infringement of Article 81 as well as Section 1 of the Sherman  
 21 Act. What they seek is not the best forum, what they seek  
 22 really at this time is no forum.

23                   THE COURT: I don't follow that. If the Statement  
 24 of Objections is binding on all the member states, then the  
 25 member states now have to afford a remedy for those

1 violations, right?

2 MR. HAUSFELD: That's what would follow logically,  
 3 and the issue becomes, you know, when you form a more perfect  
 4 union sometimes it takes some time in order to get to that  
 5 formation to get that formation into the most effective system  
 6 that harmonizes the entirety of what's been combined.

7 THE COURT: Okay.

8 MR. HAUSFELD: At the present time, that  
 9 harmonization doesn't exist but the law, the substantive law,  
 10 does and the processes that we have put forth to the Court,  
 11 the no contingency --

12 THE COURT: Wouldn't this court be required to try  
 13 to figure out what the member states are going to do with that  
 14 -- to provide the remedy. They're the ones that have to  
 15 decide the remedy, don't they? And we are bound by their law  
 16 as to remedy.

17 MR. HAUSFELD: No.

18 THE COURT: Why not.

19 MR. HAUSFELD: Because the remedy that we have  
 20 suggested is the remedy that would be in place now if the  
 21 cases were brought.

22 THE COURT: I'm just not following that.

23 I thought that the remedy was up to the member  
 24 states; and, of course, the member states have to make sure  
 25 that is an effective remedy and the member states have to make

## Argument IV - Mr. Hausfeld

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1 sure it's an equivalent remedy. But the member states have  
 2 different remedies, it seems to me, at least there's a  
 3 possibility.

4 I'm going to have to educate myself or Judge  
 5 Gleeson as to what all the member United States would do with  
 6 that state of objections, right?

7 MR. HAUSFELD: No.

8 THE COURT: Why not? Aren't we bound to if, sitting  
 9 in diversity, which is that's the analogy I'm drawing.

10 MR. HAUSFELD: Yes.

11 THE COURT: I have to apply the law of the state  
 12 that -- well, first, I got to make a Choice of Law Analysis  
 13 and then the Choice of Law Analysis, it seems to me, would  
 14 inevitably lead to foreign states, wouldn't it, and then I  
 15 have to apply their law.

16 MR. HAUSFELD: There is a difference, Your Honor,  
 17 again in terms of building or a highway under construction and  
 18 the building or highway having no design.

19 THE COURT: Your metaphor is a good one but I'm not  
 20 sure I am following you.

21 MR. HAUSFELD: Let me try it this way.

22 If you take the principle of effectiveness and  
 23 take the acknowledgement that Article 81 is mandatory, what  
 24 we're left within Europe at the present time is they know the  
 25 procedures that have to be put in place. It's a matter of

1 time for them to be enacted or put in place.

2 In the interim, this court has jurisdiction and  
 3 what we're asking this court in terms of the construction is  
 4 to apply those remedies which are available should be  
 5 available in every jurisdiction which are just waiting  
 6 implementation.

7 THE COURT: Okay, I think I get the argument.

8 Let's take about ten minutes, folks. See you  
 9 then.

10 (Recess taken.)

11 (Judge VIKTOR V. POHORELSKY takes the bench.)

12 THE COURT: Is everybody back? Did I come in early?

13 MR. ARENSEN: I think it's a different group over  
 14 there.

15 THE COURT: Oh, I see. Some people left.

16 MR. SHERMAN: We just moved.

17 THE COURT: Are there more bells and whistles? Are  
 18 there going to be more things posted?

19 All right?

20 Well, then let's move to the next issue here  
 21 which is the Foreign Sovereign Immunities Act issues. And  
 22 there was a question about who was going to argue on behalf of --  
 23 well, not who, but in what order I suppose.

24 Has that been moved out with respect to the  
 25 arguments?

Argument V - Mr. Blanch

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1 ARGUMENT V

2 BY MR. BLANCH

3 MR. BLANCH: Ryan Blanch representing Saudi Arabian  
4 Airlines.

5 Did we allocate the time per attorney but the  
6 other three counsel, the FSI A defendants, would like to be  
7 heard as well but I think we can avoid any redundancy of  
8 argument.

9 THE COURT: Yes, I would like to avoid that. So  
10 there are four in total who want to argue.

11 MR. SPECKS: There are four defendants and I will be  
12 speaking on behalf of the claims.

13 THE COURT: Then I still have a couple of other more  
14 limited issues, I guess. So, you didn't know how much total  
15 time I was going to permit.

16 MR. BLANCH: We plan on staying inside of the total  
17 time parameters.

18 THE COURT: Well, let's start. There are slightly  
19 different issues.

20 MR. SPECKS: I would like half the time.

21 THE COURT: I would like to limit the movant to  
22 about 30 minutes and then 15 minutes to the defendants if  
23 they're prepared. I mean the plaintiffs.

24 Why don't you get started Mr. Blanch and we can  
25 sort it out.

1                   MR. BLANCH: I represent Saudi Arabian Airlines. I  
 2 think if we get right to it, I think the problem that what I  
 3 would characterize as plaintiff's overbroad complaint creates  
 4 as to all defendants when we discuss Twombly and notice  
 5 issues. I think all of those problems are really magnified  
 6 when that same plaintiff purports to wrap in a foreign  
 7 sovereign into its grasp.

8                   The Foreign Sovereign Immunity Act is pretty  
 9 specific and pretty rigorous and it definitely prohibits  
 10 allowing plaintiffs to cast this loosely woven net that's  
 11 industry wide and seeks to bring in every airlines.

12                  Under the Direct Effects Test as well as  
 13 plaintiffs' argument with respect to the waiver, they just  
 14 can't meet the hurdles that are required using the same  
 15 complaint and what I think as a procedural matter. If it is  
 16 procedural, I think that plaintiffs have really had their  
 17 opportunity here to overcome their burden to show that there  
 18 is a commercial activity exception or other exception that  
 19 applies to the foreign sovereign immunity status that we have  
 20 asserted. I think plaintiffs have not contested that we are,  
 21 in fact, a foreign sovereign.

22                  THE COURT: Except as to one I think it's South  
 23 Africa, there is a real contested --

24                  MR. ARENSON: Yes.

25                  THE COURT: But as to Saudi Arabia you're Saudi

1       Arabi a.

2                    MR. BLANCH: As to Saudi Arabia, I think it's  
 3 conceded. The important note is the plaintiffs have a burden  
 4 of providing evidence to show that an exception applies and it  
 5 failed to do this, there is absolutely no evidence provided  
 6 whatsoever.

7                    The closest they came to providing evidence was  
 8 to provide the waiver. The waiver, however, is not really  
 9 evidence of anything other than a waiver exists and that  
 10 waiver itself is need to be narrowly construed and has  
 11 parameters as to what at that waives, it's a blanket waiver as  
 12 to any lawsuit.

13                  THE COURT: Let me jump back to the pleadings. At  
 14 least in their argument they assert various facts that would  
 15 suggest that the commercial activity exception would apply.  
 16 And, if those facts were pleaded, then if the facts that they  
 17 state in their papers were pleaded, would you concede that  
 18 that would establish the commercial activity exception.

19                  MR. BLANCH: If I understand the question, Your  
 20 Honor, you said that you --

21                  THE COURT: Let me see if maybe I'm not framing your  
 22 argument properly.

23                  My understanding that the thrust of the attack  
 24 on the pleadings as they now are framed with respect to the  
 25 foreign instrumentalities is that they do not plead with

1 enough specificity the jurisdictional basis for getting  
 2 jurisdiction under the foreign sovereign immunities act they  
 3 don't plead enough facts.

4 MR. BLANCH: That's correct.

5 THE COURT: But they do try to supply some facts in  
 6 their argument they're not pleading but they supply some facts  
 7 about the activities of the various defendants in terms of the  
 8 air transport services they supply.

9 My question really is that they were given the  
 10 opportunity to plead those facts wouldn't that get them over  
 11 the hump in terms of establishing the commercial activity  
 12 exception.

13 MR. BLANCH: I would have two responses and they  
 14 both result in the same answer which is no. The first issue  
 15 is, you know, have they adequately pleaded those facts  
 16 specifically enough in order to show an exception. The answer  
 17 to that is no, and if they were to replead those, if they  
 18 already have the opportunity, they certainly could have  
 19 submitted a complaint. But even if they were able to  
 20 specifically allege the kind of acts that would give rise to,  
 21 arguably, the commercial activity exception they are required  
 22 to come forward with actual evidence to show that and they  
 23 have not come forward with any evidence.

24 THE COURT: They have to come forward with evidence  
 25 at some point, obviously. But in terms of establishing

1 jurisdiction, at the outset, the Court doesn't usually have an  
 2 evidentiary hearing. They permit the Court, unless there's a  
 3 real question as to it on the face of the pleadings as to the  
 4 legitimacy of the facts, I guess. But if they plead the  
 5 facts, the Court is supposed to accord those facts, you know,  
 6 all reasonable inferences in their favor, right?

7 MR. BLANCH: I respectfully disagree with that.  
 8 However I would like to back up and restate that even if they  
 9 were to plead those facts specifically. That hasn't been done  
 10 and that is not where we are.

11 THE COURT: I understand that.

12 MR. BLANCH: However, every court, I believe it's  
 13 every court, I can't provide citations, but somewhere in the  
 14 brief it says that the once we assert that we are a foreign  
 15 sovereign, the plaintiffs have the burden to provide evidence  
 16 and that every court uses evidence; and now I'm not talking  
 17 about having a complete trial or an evidentiary hearing on the  
 18 matter, but I think that has been done before as well as at an  
 19 evidentiary hearing but some scintilla of evidence to put us  
 20 on notice and show us what they're talking about.

21 THE COURT: What do you mean? What do you mean by  
 22 evidence? You mean affidavits?

23 MR. BLANCH: Perhaps an evidence, for example, we  
 24 submitted an affidavit because we're required to put forth  
 25 some evidence that we are a foreign sovereign is a conclusory

1 statement that we're a foreign sovereign, we have to sort of  
 2 show it. It's a little easier to do, I suppose, than show a  
 3 commercial activity exception but it wouldn't be that  
 4 difficult.

5 In other words, all of the evidence that is  
 6 required to show us a bill, show us an invoice, show us one  
 7 plaintiff that was directly harmed by direct and immediate  
 8 impact by commercial activity that took place outside the  
 9 United States that gives rise to the claim and has a direct  
 10 impact, we're not.

11 Regardless of whether the claim is sufficient  
 12 as to all the other defendants, we contest that it is not but  
 13 we're not in the same boat as the other defendants and it  
 14 wouldn't be too onerous or too difficult to provide by way of  
 15 an attachment some evidence to saying here's John Doe, he  
 16 purchased this; here's the inflation amount; here's where the  
 17 conspiracy occurred. Here's what Saudi Arabian Airlines  
 18 conspired with, and here's what the claim is about or  
 19 otherwise you just have this sweeping, conclusory, broad  
 20 complaint that's meant to apply to all defendants but clearly  
 21 does not.

22 One of the examples that came up, and I think  
 23 it was discussed today. In the complaint, plaintiffs broadly  
 24 allege as to all defendants that meetings took place at the  
 25 highest level. Well, with respect to Saudi Arabian Airlines's

1 organizational chart, that means that they would be alleging  
 2 that King Abdulrahman who was at the of the organizational chart  
 3 was conspiring with all 30 airlines. I don't think they meant  
 4 to say that it was that broadly sweeping.

5 THE COURT: Nairobi is not that far away.

6 MR. BLANCH: Sorry.

7 THE COURT: Never mind:

8 MR. SPECKS: Also the Oil Cartel.

9 THE COURT: I'm sorry, I shouldn't have interrupted.  
 10 I understand the gist of that argument.

11 Move to the waiver issue, if you would, because  
 12 that seems to be an even stronger argument why there's  
 13 jurisdiction here.

14 MR. BLANCH: Okay.

15 I would argue it's not, Your Honor, because  
 16 again these are difficult arguments to make with respect to  
 17 the waiver and the Direct Effects Test because both of them  
 18 require us to look back at the complaint and say, "Is the  
 19 waiver meant to waive this kind of lawsuit?"

20 And when the complaint was that amorphous and  
 21 that broad and that occurred in the world and we don't know  
 22 what plaintiffs even apply to us, it's difficult to say the  
 23 complaint becomes a moving target at that point but  
 24 generally -- not generally -- always waivers. The case law is  
 25 strictly construed or narrowly construed.

1 The Court in Worldwide uses the language that a  
2 waiver must be clear, complete, unambiguous and unmistakable  
3 in terms of what it is actually waiving. So, if we look at  
4 the language of the waiver, it talks about waiving. I'm not  
5 going to read it to the Court, I assume the Court is very  
6 familiar with it, but waiver claims arising from air  
7 transport.

8 Well, this case is not about air transport,  
9 this case is about price fixing or the setting of a price for  
10 air cargo space regardless of where the destination is.  
11 Plaintiffs cite some argument about where we fly to and from,  
12 where Saudi Arabia has offices. That also sounds like they're  
13 confusing the issues with something broader that would apply  
14 to something more like a minimum contacts analysis for  
15 personal jurisdiction.

16 For this, they have to show it doesn't matter  
17 where we fly, what's relevant is the commercial activity which  
18 is creation of contracts, we don't know if contracts exist and  
19 the price setting which they allege was a result of price  
20 fixing which resulted in an increase at least on surcharges.

21 So, if I can encapsulate what I'm saying  
22 here --

1                   MR. BLANCH: The distance is based on the language  
 2 of the waiver.

3                   THE COURT: The waiver is, and I don't have the  
 4 language of it, but it's a standard waiver clause that's part  
 5 of the authorization process, right?

6                   Am I right about that?

7                   So, it's a standard clause that applies to  
 8 everybody as I recall.

9                   MR. BLANCH: That's true. The waiver essentially  
 10 becomes a contract and the waiver has to be analyzed and clear  
 11 on its face just as a contract would be and, in fact, the  
 12 courts go a step further and say it's got to be narrowly  
 13 construed and really clear as what's being waived when you  
 14 read the language of the waiver. It sounds like it's waiving  
 15 anticipated lawsuits deriving from running a air transport  
 16 service which is when the goods arrive, the goods were broken,  
 17 the plane crashes, those all sorts of things go to air  
 18 transport. In fact, plaintiff cites cases that all talk about  
 19 plane crashes.

20                   THE COURT: Okay.

21                   MR. BLANCH: Here we have the setting of prices for  
 22 cargo space and I would make the analogy that is akin to a  
 23 broker, for example, that simply sells the space regardless of  
 24 where that airplane is going, the broker is washing his hands  
 25 of the transaction once the space is sold.

1                   The mere fact that the airline also handles the  
 2 shipping themselves doesn't mean it gives rise to plaintiff's  
 3 claim it simply doesn't.

4                   THE COURT: Okay. Have you completed your  
 5 presentation, Mr. Blanch?

6                   MR. BLANCH: If I may have 30 seconds to make sure I  
 7 didn't get too thrown off.

8                   I want to conclude with one more point Your  
 9 Honor mentioned earlier.

10                  I believe it was during the Twombly argument  
 11 that it looks like from this complaint that you're just  
 12 plaintiffs were just sort of lumping all the other defendants  
 13 in and that's exactly what is happening with respect to the  
 14 complaint as to all defendants but it's even more so the case  
 15 with a foreign sovereign.

16                  You simply can't lump us in, you have to come  
 17 forward with evidence. You have to single us out and say,  
 18 well, why are we in this specifically, not that generally,  
 19 there was a global conspiracy at the highest level because for  
 20 us I don't think it was King Fahd.

21                  THE COURT: In a sense, it's the heightened pleading  
 22 placement required by the Foreign Sovereign Immunities Act.

23                  MR. BLANCH: That's what it is. Was there a direct  
 24 effect because a direct effect of what? Which conspiracy?  
 25 Which meeting? Which contract? Which pricing? It's just not

1 there, so there is no way to get very deep in the analysis on  
 2 the complaint unless they come forward with an actual  
 3 example --

4 THE COURT: Okay.

5 MR. BLANCH: -- of what the harm is.

6 THE COURT: Okay. Thank you. So Mr. Pri ver.

7 MR. PRI VER: It's Mr. Pri ver, Your Honor.

8 THE COURT: Mr. Pri ver.

9 ARGUMENT V

10 BY MR. PRI VER

11 MR. PRI VER: Mark Pri ver on behalf of Thai Airlines.

12 I want to clarify a couple of things that the  
 13 Court raised and also that Mr. Blanch addressed.

14 I think it is important for the court to find  
 15 that the sole basis of jurisdiction against these -- at least  
 16 three of the defendants -- about which there is no question  
 17 whether they qualify as a foreign state under the Foreign  
 18 Sovereign Immunity Act. The sole basis this is that not  
 19 Sherman Act, not diversity, not CAFRA it's nothing else but  
 20 that.

21 The sole question we're dealing with here is  
 22 why we should be in the case and the rest of us should be in  
 23 this case at all which is why, Your Honor, I believe that it's  
 24 more than just a heightened pleading standard. It is as if  
 25 you read many of these cases and I don't recall reading

1 anywhere it was just on the pleadings. But if you read  
 2 Philatech and some of the other cases that follow. It talks  
 3 about that it is the plaintiff's obligation once the defendant  
 4 advances evidence tending to show that it is a foreign  
 5 sovereign the presumption of immunity arises, and then the  
 6 burden shifts to the plaintiff to produce evidence and I  
 7 assume, as I would imagine everybody else does, that when the  
 8 courts use evidence, they mean evidentiary facts. They're not  
 9 talking about argument or pleading.

10 Now, the argument and pleading may later on or  
 11 could give the plaintiffs a ticket to jurisdictional  
 12 discovery, but we are now here on the second amended complaint  
 13 and they have not advanced any evidence whatsoever that tends  
 14 to show in the case of my client, Thai Airways, or any of the  
 15 other defendants, number one, that we participated in any kind  
 16 of conspiracy anywhere; and number two, whether that  
 17 conspiracy, if we did participate in it, had a direct effect  
 18 on the pricing of air cargo services in the United States.

19 The case under the commercial activity  
 20 exception focuses on the concept of the language "based upon."  
 21 The complaint, the action has to be based upon a commercial  
 22 activity and then there's three different prongs. The "based  
 23 upon" analysis requires the Court to consider what the  
 24 gravamen of the complaint is, and in this case the gravamen of  
 25 the complaint is not the harm which is the price, the gravamen

1 of the complaint is the unl awful conspiracy because wi thout  
 2 that, there is no case.

3 So the plainti ffs have to show, in oppositi on  
 4 to these motions, in which vi ew wi th evi dence which they have  
 5 failed to do that there is a connecti on between a conspiracy  
 6 that they have yet to prove and the commercial behavi or of my  
 7 client and these other defendants in this court, excuse me, in  
 8 the United States; and they have not advanced a singl e  
 9 declarati on by a singl e member of their class that purchased  
 10 air transportati on on any one of these carriers.

11 THE COURT: Okay. So, the evi dence that you woul d  
 12 say they woul d have to produce is some sort of a declarati on,  
 13 some sort of statement under oath that is to establish a set  
 14 of juri sdicti onal facts under the FSIA.

15 MR. PRI VER: At a bare mi nimum, they have to at  
 16 least show that somebody wi thin the class purchased  
 17 transportati on on Thai Ai rways because they don' t get a ticket  
 18 to prosecute an anti trust Lawsuit agai nst us because of the  
 19 behavi or of other al leged conspirators.

20 THE COURT: Okay.

21 MR. PRI VER: The law is clear, there needs to be a  
 22 connecti on between the al leged conspiracy and our commercial  
 23 activi ty in the United States, not somebody el se 's.

24 THE COURT: Understood.

25 MR. PRI VER: On the wai ver issues, the wai ve doesn' t

1 prove anything. What the waiver does is it re incorporates the  
 2 law of the commercial activity exception and I have it here.  
 3 Basically, it states, "Carrier agrees to waive sovereign  
 4 immunity with the qualification but only with respect to those  
 5 actions or proceedings that are based on the carrier's  
 6 operation in international air transportation; that, according  
 7 to the contract of carriage include points in the U.S. as a  
 8 point of origin, point of destination more agreed stopping  
 9 place, et cetera.

10 That "based on" language is the same language  
 11 that's used in the commercial activity exception. The based  
 12 upon -- on and upon are synonymous. The case law that talks  
 13 about construing waivers which Mr. Blanch referred to the  
 14 Worldwide Minerals case, 296 F.3d 1154, Page 1162. "In  
 15 general, explicit waivers of sovereign immunity are narrowly  
 16 construed in favor of the sort and are not large in general."

17 This is a quotation, actually, "Explicit  
 18 waivers of sovereign immunity are narrowly construed in favor  
 19 of the sovereign and are not enlarged beyond what the language  
 20 requires."

21 Sorry for going so fast.

22 So, again, the DOT -- and this is basically a  
 23 contract, and the case law is telling the Court that it must  
 24 construe the language essentially against the DOT and in favor  
 25 of the sovereign. So, because it seems that they use the same

1 I language based, "based upon," that they use in the commercial  
 2 activity exception, there is the analytical framework for  
 3 determining whether the waiver applies is the same analytical  
 4 framework you would use to evaluate whether the commercial  
 5 activity exception applies.

6 In other words, that the gravamen of the  
 7 complaint, the awful conspiracy, resulted in super  
 8 competitive prices being charged by Thai Airways and the other  
 9 foreign sovereign air carriers here in the United States.  
 10 Plaintiffs would have to go on to prove that their clients,  
 11 some or all of them, whichever ones that did actually purchase  
 12 that transportation. Either from a point of origin in the  
 13 United States to, in my client's case, Bangkok or vice versa  
 14 or that they purchased the contract of carriage and none of  
 15 that is done. None of that is done by way of evidence and it  
 16 is certainly not done by way of pleading.

17 So, I would urge the Court that here today in  
 18 the absence of any proof that the complaint is based upon Thai  
 19 Airways's commercial activity or that it has waived its  
 20 sovereign immunity with respect to this particular action that  
 21 this action would be dismissed under the Foreign Sovereign  
 22 Immunities Act in toto.

23 THE COURT: Without leave to replead.

24 MR. PRI VER: Proof without leave to replead because  
 25 this is if you look at Philatech they had almost a full blown

1 trial and pleading is not just the only issue and it's not  
2 like the plaintiffs didn't know what their burden was in this  
3 situation.

4 So, I would ask the Court to dismiss the case  
5 in its entirety.

6 THE COURT: All right.

7 MR. PRIVER: Thank you.

8 THE COURT: Mr. Atadi ka.

9 ARGUMENT VI -A

10 BY MR. ATADI KA

11 MR. ATADI KA: Good afternoon, Your Honor.

12 I think this case can be looked at from the  
13 very simplified approach and a complicated one as far as the  
14 defendants who are subject to the FSIA are concerned. In a  
15 simple way, Your Honor has to see whether or not the pleadings  
16 that have been advanced by the plaintiffs, whether those  
17 pleadings actually catch the FSIA defendants; whether they  
18 are, in fact, able to obtain jurisdiction for this court to  
19 determine matters affecting foreign sovereigns.

20 Now, Your Honor, my first submission that when  
21 the plaintiffs began this litigation, they probably never  
22 thought that there were companies or airlines that were  
23 subject to -- that were not, in fact -- were owned by foreign  
24 sovereigns and not subject to the general jurisdiction of this  
25 court.

1 The FSIA defendants are very unique, they are  
2 unique, so before you can obtain jurisdiction against an FSIA  
3 defendant, you have to plead the FSIA with us an inclusive law  
4 under which any foreign sovereign can be proceeded against.  
5 That, when you look at the totality of the pleadings, there's  
6 no way you can see that the FSIA defendants were ever in the  
7 vision of the plaintiffs.

8 THE COURT: I agree.

9 MR. ATADI KA: It was only later on --

10 THE COURT: I agree.

11 MR. ATADOKA: -- that they concede in adding some  
12 other people, some other company.

13 In fact, the only paper that I have here  
14 applicable to my airlines is Paragraph 47 of the Amended  
15 Statement of Claim and apart from that there is nothing more.  
16 In fact, anybody who wants to sue an FSIA defendant must  
17 realize that foreign governments are not subject to jury  
18 trial; and in this case, it's actually proceeding on the basis  
19 of going before a jury trial and the foreign sovereigns are  
20 not subject to trial.

21 So, basically, we are saying that if you want  
22 to approach this from a simple angle, there is no pleading  
23 which searches and concerns specifically the FSI A defendant.

24 Based on that alone, this action should be  
25 dismissed against those people, those companies, because

1 there's nothing envisaged whatsoever that deals with the  
2 contemplation of this. There is nothing at all.

15 THE COURT: I understand this argument; I'm not  
16 persuaded by it, but I understand the argument so you don't  
17 need to carry on. I read it from your papers, it's not  
18 persuasive to me. You are best off moving to something else.

19 MR. ATADIKA: We ask respectfully that may have to  
20 reconsider it went as far as it could be to the Second  
21 Circuit.

22 THE COURT: Okay.

23 MR. ATADI KA: And Your Honor I see your position on  
24 that.

25 THE COURT: Yes.

1                   MR. ATADI KA: Now, the evidence, Your Honor, we have  
 2 raised is if the airline was not properly served.

3                   THE COURT: What would be required? I'm not sure I  
 4 understand that the service has to be some higher level  
 5 official and that's because and I'm not sure I follow why that  
 6 was required.

7                   MR. ATADI KA: Your Honor, there is an -- I would  
 8 like to draw your attention to the FSIA provisions on this  
 9 because I think --

10                  THE COURT: It's right out of the statute.

11                  MR. ATADI KA: Your Honor, this is Section 1608 which  
 12 applies to service. First of all, the first way to deliver  
 13 service to -- delivery of a copy, by the delivery of a copy of  
 14 a summons and complaint in accordance with a special  
 15 arrangement, the service between the plaintiff and the foreign  
 16 state. In other words, by a prearranged procedure which has  
 17 already been agreed upon by the parties.

18                  THE COURT: Yes.

19                  MR. ATADI KA: Secondly, you can do so by delivery of  
 20 the Summons and Complaint to an officer of the defendant.

21                  Now, in this particular case, we have provided  
 22 an affidavit that the person that was served was not an  
 23 officer of the airline. Now, the plaintiffs countered to say  
 24 that, well, he was an employee about the, Your Honor, FSIA is  
 25 the only law which applies to sovereigns and is very exclusive

1 so they got to go very closely, examine it. By the wording,  
2 if they don't serve the document according to the express  
3 language of the statute it will not be a proper service. Your  
4 Honor, they say --

5 THE COURT: How can they properly effect service in  
6 the United States?

7 MR. ATADI KA: Your Honor, we provided an affidavit  
8 of a list of officers who are at the level that can be served  
9 and this is an affidavit, Your Honor.

10 THE COURT: Okay.

11 MR. ATADI KA: And, Your Honor, we also said that  
12 even if -- they said it was a substantial complaint but we  
13 don't accept that it was a substantial complaint, Your Honor.

14 THE COURT: Okay.

15 MR. ATADI KA: Your Honor, the other argument that we  
16 have advanced is that we were brought into this lawsuit in  
17 February 2007. This action --

18 THE COURT: This is the statute of limitations  
19 argument.

20 MR. ATADI KA: Yes, Your Honor.

21 THE COURT: Let's deal with that later. I will deal  
22 with that later. We will focus on the FSIA arguments.

23 MR. ATADI KA: Your Honor, as far as the FSIA is  
24 concerned, we believe that the plaintiffs have not met their  
25 burden under the provisions of that act.

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1 THE COURT: Thank you. Mr. Cross.

2 ARGUMENT VI -A

3 BY MR. CROSS

4 MR. CROSS: Yes, Your Honor.

5 I'm Wayne Cross from White & Case representing  
6 South African Airways. We have a slightly different issue, as  
7 you noted, from the other defendant under the FSIA. There has  
8 been a question raised by the plaintiff as to whether or not  
9 we ARE a foreign sovereign.

10 THE COURT: Let me just jump ahead of you if you  
11 will permit me. There's not a factual dispute, it seems to  
12 me, about whether or not at the time of service South African  
13 Airways was a foreign instrumentality. In other words, there  
14 was a plan in place for it to become one but that plan had not  
15 reached fruition at the time that the action was brought and  
16 served.

17 Am I right about that fact?

18 MR. CROSS: You are right as to one prong of  
19 Section 1603(b).

20 §1603(b) has two prongs to it. One is you have  
21 to be an instrumentality of a foreign sovereign by either  
22 being an organ of a foreign sovereign or by being a  
23 majority-owned entity, a majority of the stock being owned by  
24 a foreign sovereign. There is sovereign -- there is no  
25 factual dispute, that is a ministerial dispute. At the time

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1 the client was filed, it had not been completed.

2 On the other hand, it's also not disputed -- at  
 3 least I don't think it's disputed -- that at the time in  
 4 February of 2007. When the complaint was filed, South African  
 5 Airways was an organ of South Africa, a department of the  
 6 Department of Public Enterprises was operating it as an  
 7 agency. They were directing as an agency of South Africa.

8 THE COURT: You are relying on the notion because my  
 9 next question was going to be why should the Court deviate  
 10 from the normal rule which you examine jurisdiction at the  
 11 time of service, at the time of the bringing of the action.

12 You're saying at the time of the bringing of  
 13 the action, in fact, under 1603(a) was a quote, "Organ," of  
 14 the South African government and is there a test for deciding  
 15 what's an organ.

16 MR. CROSS: There are a series of facts articulated  
 17 in the briefs.

18 THE COURT: Okay.

19 MR. CROSS: The test is, it's a fluid test, that is  
 20 to be applied liberally. It has to do with who is actually in  
 21 control and to what extent of the employees and the Government  
 22 to what extent are the activities of sovereign activities.

23 THE COURT: And you would agree you have to make a  
 24 prima facie showing as to that.

25 MR. CROSS: And in our initial affidavit

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1 establishing foreign sovereign, attempting to establish we're  
 2 a foreign sovereign we lay out those factors. But also I lay  
 3 out the underlying legislation and statements of principle  
 4 about why the company was being acquired.

5 So, to be clear, though, I'm not relying  
 6 strictly on the organ aspect of it, I believe that we were at  
 7 the time the client was filed as an organ of South Africa; as  
 8 a result of that, FSIA jurisdiction attached.

9 In addition to, that however, while you  
 10 articulate what you why shouldn't I follow the normal rule  
 11 that jurisdiction attaches at the trial --

12 THE COURT: The Court examines the jurisdiction.

13 MR. CROSS: Typically the Court is examining  
 14 jurisdiction under either federal question or diversity as of  
 15 that date, and as of that date you don't defeat diversity by  
 16 moving out of the state or moving into the state, but this is  
 17 Foreign Sovereign Immunity Jurisdiction.

18 Our papers establish, and I believe it's a  
 19 fact, that while there are a couple of cases including a  
 20 Supreme Court case that says that you measure FSIA  
 21 jurisdiction as of the date of the filing of the complaint.  
 22 There is no case that says that you do not look at the status  
 23 of the sovereign at the time the motion is made.

24 Each of those cases are cases the Dole case in  
 25 particular which is a Supreme Court case.

1                   Dole against Patrick looked at a situation  
 2 where the entity had lost its foreign status, its sovereign  
 3 status, prior to the filing of the complaint and said we're  
 4 dealing with comity and the Supreme Court articulated, "When  
 5 we look at present political reality, we're dealing with  
 6 comity here. How do we deal with our neighbor states if an  
 7 entity is not a foreign sovereign at the time we have to deal  
 8 with that, we're not going to give it foreign sovereign  
 9 status."

10                  In all of the cases that I have looked at in  
 11 post filing events where an entity becomes sovereign after the  
 12 fact, after the filing, have hoarded comity because burdens of  
 13 proof are articulated in Dole under the principles of comity  
 14 which are to protect foreign sovereigns to some extent subject  
 15 to exception to some extent from the inconvenience and burden  
 16 of being dragged in our courts and subject to a jury trial.

17                  Those principles apply equally post filing at  
 18 the date of filing. The most recent example of that which is,  
 19 I don't know how to say this, I don't mean it do be  
 20 disrespectful but it's very Posnerian. Judge Posner writing  
 21 for the Seventh Circuit reversed a district Court case that  
 22 held that an entity that ceased to be sovereign post filing  
 23 lost its right to a nonjury trial because it was no longer a  
 24 sovereign.

25                  Judge Posner said, "Oh, no we do view these

1 cases at the day of the filing." And nonetheless, and I will  
 2 read what Judge Posner says quoting from Dole. He says,  
 3 "Alitalia's change of status might be a good reason to do away  
 4 with jury trial but it is quite apart from the practical  
 5 concerns of preparation of predictability that we have  
 6 emphasized."

7 So far that is the purpose of the Foreign  
 8 Sovereign Immunity Act. I quote further, "To give foreign  
 9 states and instrumentalities from the inconvenient gesture of  
 10 comity from the United States does not fall out of the picture  
 11 when a foreign state entity is privatized."

12 All the other cases that we cited and I'm not  
 13 aware of a case that stands for the proposition that where you  
 14 got a foreign entity -- let me make one thing clear: As we  
 15 stand here, there is no question of fact that we are a foreign  
 16 sovereign. We have completed everything; all the shares are  
 17 owned by the South African government. So, as we stand here  
 18 today, we're a foreign sovereign.

19 So, the question is for you is, okay, where are  
 20 your links? Is that enough to deny us comity? Nothing else  
 21 has happened in this case and there is not one case that  
 22 stands for that proposition. So, if there is a question of  
 23 fact as to whether we should be accorded sovereign status.

24 Finally, and I won't belabor this because it's  
 25 in our papers.

1                   There is a doctrine supported by two cases both  
 2 in the Second Circuit, unfortunately, that stand for the  
 3 proposition that there is something called a de facto  
 4 sovereign under the Foreign Sovereign Immunity Act which is  
 5 akin to what I just argued which is: If an entity status  
 6 changes to sovereign status post filing, there can be a  
 7 finding that depending on what its status is notwithstanding  
 8 the fact that it was not technically a sovereign at the date  
 9 of filing.

10                  It was de facto sovereign because its  
 11 sovereignty was imminent in inevitable. That principle was  
 12 articulated by Justice Harlan when he was sitting in the  
 13 Second Circuit on Mubarak. It was a foreign immunity case but  
 14 foreign sovereign immunity hadn't passed yet. The question  
 15 was for jurisdictional purposes: Was the State of India,  
 16 prior to the time it achieved full independence from the  
 17 British Empire, and it was clear it had not achieved full  
 18 independence from the British Empire, but it was clear that  
 19 all the steps that were necessary to be taken to accomplish  
 20 that had been accomplished. It was only a matter of timing  
 21 that Justice Harlan that binds de facto sovereign prior to the  
 22 filing of the complaint even though it was, in fact,  
 23 sovereign.

24                  Judge Sweet and Judge Sweet followed that the  
 25 Republic of Palau because of the imminency piece of that,

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1 Palau hadn't been finalized in the five years since removal  
 2 and the Second Circuit said, well, the principle stands but,  
 3 you know, it's not imminent anymore so the principle doesn't  
 4 apply. That also stands for the proposition that as of the  
 5 date of filing we were sovereign.

6 There's kind of three legs to my argument. At  
 7 the end of the baseline as I said we are sovereign as we stand  
 8 here and the question is, you know, are you prepared absent  
 9 any cases that are directly to the contrary to say we're not  
 10 going to accord the South African government the benefits of  
 11 sovereignty. Simply we were late, we concede we were late.  
 12 We were in the process, it just takes time to get through that  
 13 process.

14 If you'll indulge me briefly.

15 THE COURT: Just very briefly.

16 MR. CROSS: I want to address one question that you  
 17 asked Mr. Blanch.

18 You said if the evidence that they put forward  
 19 in response to the motion were pled would that be enough? And  
 20 at least in the case of South Africa, my answer would be no,  
 21 because the evidence, at least in the case of South Africa,  
 22 and there are pages from the website that establish nothing  
 23 more than that. We have an office in Thailand for air cargo,  
 24 we have an office in Johannesburg for air cargo and we have  
 25 airplanes to and from the United States. That's not enough

1 evidence to establish that we engage in any contact in the  
 2 United States that's connected to this conspiracy or, for that  
 3 matter, that we even contract cargo services in the United  
 4 States.

5 Now, it may be that it may establish that we  
 6 contract for air cargo services outside the United States but  
 7 when you reach that step, then you have to face the effects  
 8 test which is conduct outside the United States under the  
 9 Foreign Sovereign Immunity Act under the commercial activity  
 10 exception which says, "Conduct outside of the United States  
 11 must have a direct, nontrivial substantial effect on U.S.  
 12 commerce."

13 It also has to be connected to the conspiracy,  
 14 they pled that; and B, I think I heard Mr. Tompkins say this  
 15 morning that they eschewed attempted establishment in response  
 16 to a question that you asked about the FTIA and the effects  
 17 test. Whether they were arguing the effects test or whether  
 18 they are arguing the imports exception.

19 I think Mr. Tompkins said something like we  
 20 think we might be able to do that, it's a very complicated,  
 21 very challenging intellectual exercise and we haven't done  
 22 that. So, I think that, A, the only evidence one could find  
 23 in this record is that we may do some air cargo business off  
 24 shore which may come to the United States, but I think the  
 25 plaintiffs have eschewed attempting to remove the kind of

Argument VI -A - Mr. Cross

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1 effects under the Foreign Sovereign Immunity Act to get out  
2 from under the exception.

3 Thank you.

4 (Continued on the next page.)

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1 ARGUMENT VI -A (Continued)

2 BY MR. CROSS:

3 THE COURT: Okay? Can I ask one question of you?

4 Let me just ask Mr. Cross one question.

5 MR. CROSS: Sure.

6 THE COURT: . . The way that would normally proceed,  
 7 it seems to me is, let's assume the plaintiffs, the  
 8 defendants, plaintiffs, plead adequate facts in the complaint  
 9 to establish or to suggest that they could establish the  
 10 jurisdictional basis for their claims. Then you, I guess,  
 11 could say well, we're a foreign sovereign, but they have  
 12 already pleaded facts to indicate they could get over that.

13 The next step would be that there would be required  
 14 to make some sort of evidentiary submission to support the  
 15 facts.

16 MR. CROSS: I believe that's right. I think the  
 17 standard of proof cases talk about if we're going to make a  
 18 motion under the Foreign Sovereign Immunities Act, then we  
 19 have to establish a prima facie case that we're a foreign  
 20 sovereign. And they have to come forward with evidence.

21 THE COURT: At that point. Since you've made the  
 22 motion at the point when --

23 MR. CROSS: Okay. And then we came forward with an  
 24 affidavit and they came forward with their web.

25 THE COURT: Thank you.

1                   That's not Mr. Tompkins now, it's Mr. Specks.

2 ARGUMENT VI -B

3 BY MR. SPECKS:

4                   MR. SPECKS: Good evening, Your Honor. Gary Specks  
 5 of Kaplan Fox on behalf of the plaintiffs.

6                   If I may, the first thing I would like to address is  
 7 some statements that have been made by some of the SI  
 8 defendants to the effect that there are no facts supporting  
 9 our jurisdiction, our jurisdiction over the SI defendants  
 10 and what I regard as a misstatement of the standard on a  
 11 Rule 12(b)(1) motion that occurs before discovery has taken  
 12 place.

13                  First of all, prior to discovery, a plaintiff facing  
 14 a jurisdictional motion which challenges the illegal  
 15 sufficiency of the complaint's jurisdictional allegations can  
 16 defeat that motion by pleading allegations that are legally  
 17 sufficient to make out a prima facie showing of jurisdiction,  
 18 or, and/or, by relying upon materials outside of the pleadings  
 19 that contain averments of fact, which if proven or if credited  
 20 by the Court, would be sufficient to establish jurisdiction.

21                  Now, not only do we have allegations in the  
 22 complaint that establish the commercial activity exception, if  
 23 taken as true, we've also submitted a substantial appendix of  
 24 materials outside the complaint which contain averments of  
 25 fact, which if credited by the Court, also establish that the

1 jurisdiction over the SI defendants.

2 THE COURT: I'm troubled by I guess it does come  
 3 back to the Twombly issue. I don't see a single specific  
 4 allegation as to any, any of these four who have raised the  
 5 FSI A. It just talks about the defendants in a very global  
 6 way.

7 MR. SPECKS: Your Honor, we have very specific  
 8 allegations as to each of the defendants and they include the  
 9 SI defendants to the effect that they are engaged in  
 10 commercial activity in the United States and throughout the  
 11 world in terms of being involved in, they say, air freight  
 12 shipping services within the United States and throughout the  
 13 world, among other things.

14 I would refer Your Honor, there's -- we set forth  
 15 these jurisdictional allegations in our brief. It begins,  
 16 it's called Plaintiffs' Statement of Jurisdictional Facts. It  
 17 begins at page 3 of our brief and continues on page --

18 THE COURT: You know --

19 MR. SPECKS: -- page 8.

20 THE COURT: -- it would be a lot easier if you  
 21 pointed to the complaint.

22 MR. SPECKS: We're reciting the complaint, Your Honor.

23 THE COURT: I understand. But maybe rather than --  
 24 direct me to the complaint as opposed to the brief.

25 MR. SPECKS: So. . .

1 THE COURT: I see that you do --

2 MR. SPECKS: -- allegation with respect to  
3 defendant, South African Airways.

4 THE COURT: Right. So, you're talking about in the  
5 early --

6 MR. SPECKS: Right. The allegations that they're  
7 engaged in commercial activity. If they're engaged in  
8 commercial activity within the meaning of the FSIA, the Court  
9 has jurisdiction over them. It's an exception to sovereign  
10 immunity.

11 There are also numerous documents.

12 THE COURT: You're saying by virtue of say, let me  
13 look at page --

14 MR. SPECKS: Just as an example.

15 THE COURT: Where is it? Where you had defined the  
16 defendant parties. And I'm looking for one of these four  
17 here.

18 Yes, at 47. Paragraph 47. The assertion is that:  
19 "Defendant Ethiopian Airlines Corp. is a foreign company  
20 located in Bole International Airport, Addis Ababa. Ethiopian  
21 conducts air freight shipping services throughout the world  
22 including the U.S. and this district".

23 And that's what you're saying satisfies the  
24 jurisdiction?

25 MR. SPECKS: No, Your Honor, that's a single

1 allegation among many allegations in many documents that are  
 2 attached in an appendix to our brief where we also attach  
 3 registrations showing that they're doing business in the  
 4 United States, that they have offices in the United States,  
 5 that they are shipping air freight into and out of cities in  
 6 the United States, all of which go to the commercial  
 7 activities exception and bear on whether or not they are  
 8 entitled to sovereign immunity in this case.

9 THE COURT: So, just you would point me to the  
 10 appendix to your brief, and that is -- you don't have to do it  
 11 right now.

12 MR. SPECKS: Okay.

13 THE COURT: But you would say that the appendix,  
 14 coupled with the assertions in the complaint, satisfy your  
 15 evidentiary showing, the evidentiary showing that's necessary  
 16 under the test that the defendants advance.

17 MR. SPECKS: Your Honor, prior to discovery a  
 18 standard on a Rule 12(b)(1) motion is that you are not  
 19 required to make a -- when you say evidentiary showing, in  
 20 terms of actually submitting admissible evidence -- because  
 21 we've had no discovery, we've had no opportunity to discover  
 22 any of the facts.

23 THE COURT: All I'm asking you is, is that -- I  
 24 mean, there is some language in the cases that says that there  
 25 has to be an evidentiary showing, a showing of evidence.

1                   And I'm only asking you if what you're saying is  
 2 that the evidentiary showing in the it appendix and in the  
 3 pleadings is sufficient to satisfy that burden? That's all I  
 4 I'm asking.

5                   MR. SPECKS: Yes. The complaint allegations, which  
 6 must be taken as truth at this juncture --

7                   THE COURT: Right.

8                   MR. SPECKS: -- in addition to the evidentiary  
 9 materials that are in the appendix, which we summarize in our  
 10 brief --

11                  THE COURT: Okay.

12                  MR. SPECKS: -- as jurisdictional statement of  
 13 facts.

14                  THE COURT: All right.

15                  MR. SPECKS: So, I do take issue with what  
 16 defendants are saying the standard is and the idea that we  
 17 haven't submitted any quote, "facts" on the issue.

18                  THE COURT: Okay.

19                  MR. SPECKS: That's my first point.

20                  My second point, on the waiver. I don't think the  
 21 waiver could be much clearer than it is, Your Honor. I mean,  
 22 it says it: "Applies in any actions or proceedings brought  
 23 against these defendants in courts of the U.S. that are based  
 24 on their operations and international air transportation that,  
 25 according to the contract of carriage, includes any point in

1 the U.S. as a point of origin, point of destination or agreed  
 2 stopping place".

3 This is a condition that the Department of  
 4 Transportation imposes on these foreign air carriers as a  
 5 condition to them flying into and out of the United States.

6 THE COURT: And does the appendix cite to such  
 7 operations?

8 MR. SPECKS: Yes.

9 THE COURT: Okay. That there's, in other words,  
 10 identified contracts of carriage where, with some point in the  
 11 United States.

12 MR. SPECKS: Absolutely.

13 THE COURT: Okay.

14 MR. SPECKS: And frankly, I'm, I mean, you might  
 15 want to ask the defendants why, how they can come in here and  
 16 claim sovereign immunity when they have in their possession  
 17 explicit waivers of that sovereign immunity. I was kind of  
 18 shocked, frankly.

19 Thai Airways. We now have a new heightened pleading  
 20 standard being proposed by Thai Airways. Even the Supreme  
 21 Court in Twombly said that there are no heightened pleading  
 22 standards except as provided in the Federal Rules of Civil  
 23 Procedure, and if you want to impose one, you have to amend  
 24 the Federal rules.

25 There are no heightened pleading standards simply

## Argument VI -B / Mr. Specks

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1 because --

2 THE COURT: That was my language.

3 MR. SPECKS: Right.

4 THE COURT: I think that what they're taking from  
 5 the FSIA cases is that there is a requirement that there be  
 6 sufficient pleadings, sufficient statements in the pleadings  
 7 to establish subject matter jurisdiction. I'm not sure if  
 8 that's accurate. I thought that's what they were saying.

9 What about, does the waiver of sovereign immunity  
 10 mean that they have, they haven't waived a right to a jury --  
 11 I mean, their right not to have a jury trial?

12 MR. SPECKS: Absolutely they have, Your Honor. If  
 13 they're not a foreign state, if they waive their sovereign  
 14 immunity, they are subject to our demand for a jury trial.

15 If they are a foreign state, and they may be subject  
 16 to some other exception to immunity, but they would still be  
 17 entitled to a nonjury trial in that case.

18 THE COURT: I'm sorry, say that again.

19 MR. SPECKS: All right.

20 There's one defendant. South African Airways.  
 21 There is a real issue as to whether or not they are a foreign  
 22 state.

23 THE COURT: All right. The others are foreign  
 24 states.

25 MR. SPECKS: That is significant because if they are

1 not a foreign state, then they are subject to being tried  
 2 before a jury. Otherwise, they would not be.

3 THE COURT: Okay. That's what I'm saying. So, the  
 4 others have retained the right not to be tried by a jury.

5 MR. SPECKS: Right. But that doesn't mean they're  
 6 immune.

7 THE COURT: Understood. They come into this court,  
 8 but they're still required to answer the claims. They just  
 9 retain a right not to have those decided by a jury. Okay.

10 Now, talk about South Africa and their acquired  
 11 status. Well, both arguments; the organ argument and then --

12 MR. SPECKS: Counsel for South African Airlines said  
 13 well, there's no case standing preventing Your Honor from  
 14 considering these post-filing developments in the South  
 15 Africa's status in determining whether or not they're a  
 16 foreign state.

17 Well, there's only one case, Your Honor. It's  
 18 called the Patri ckson case and it was decided by the  
 19 U. S. Supreme Court. And what it says is that you determine  
 20 the foreign state status of an entity at the time of filing.  
 21 Period. End of story. That's the holding of the case.

22 THE COURT: Patri ckson?

23 MR. SPECKS: Yes. Dole, I believe.

24 THE COURT: Dole, yes.

25 MR. SPECKS: Dole Foods.

1                   THE COURT: Yes, that's the way I know it.

2                   MR. SPECKS: Now, after realize that the Patrickson  
 3 case destroyed their theory that just because an intermediate  
 4 subsidiary owned stock in South African Airways, once they  
 5 realize that under Patrickson that wasn't enough to give them  
 6 sovereign immunity or foreign state status, they started  
 7 arguing that they're somehow an organ of a foreign state as of  
 8 the date of the that the complaint was filed.

9                   But there isn't any showing, there isn't any factual  
 10 showing of any of the factors that are required to show that  
 11 South African Airways was an organ of a foreign state. The  
 12 only, the only thing they point to, they say in June of 2006,  
 13 that South African Airways began reporting to the Department  
 14 of Public Enterprises. However, at that point in time, their  
 15 stock was still owned by an intermediate subsidiary.

16                   Now that factor alone, I'm sorry, does not establish  
 17 their status as an organ of a foreign state. They have the  
 18 burden on that. It is their burden to show that by a  
 19 preponderance of the evidence. And they have not done so.  
 20 They don't even address any of the factors under the case law  
 21 that you're supposed to look at.

22                   So, I would suggest, Your Honor, that --

23                   THE COURT: Their submission on that issue, you say,  
 24 does not touch on any of the issues that the Court should look  
 25 at.

1                   MR. SPECKS: The only possible point they make in  
 2 any of their submissions that could bear on that is they point  
 3 out that in June of 2006, they claim that South African  
 4 Airways began reporting to the Department of Public  
 5 Enterprises of the Republic of South Africa. Okay? But there  
 6 are numerous other factors that the courts consider and weigh  
 7 in determining whether or not an entity is an organ of a  
 8 foreign state. And none of those are addressed. So, the fact  
 9 that they raise that one point can't in itself establish their  
 10 status as a foreign state.

11                  To the extent Your Honor is inclined not to accept  
 12 our position or is inclined to accept their position that  
 13 they've made some kind of a *prima facie* showing or proven that  
 14 they are an organ of a foreign state, we would request  
 15 discovery on that issue because it is very much a factual  
 16 issue which we have not had an opportunity to address. And  
 17 thus far, South African Airways has resisted all discovery.

18                  If Your Honor has any questions in particular about  
 19 what we've submitted, I would be happy to answer them. It's  
 20 late. I'm not going to repeat what is in our brief. We  
 21 believe that there's waiver here; that South African Airways  
 22 is not a foreign state entitled to sovereign immunity; that  
 23 the commercial activity exception to sovereign immunity  
 24 applies; and that the motion should be denied.

25                  THE COURT: And as far as subjecting a foreign

1 sovereign to discovery on the issue of whether they are a  
2 foreign sovereign, is there authority for that?

3 MR. SPECKS: Absolutely. Until the, what the  
4 decisions generally say, Your Honor, is that until the  
5 jurisdictional issue has been determined, any discovery that  
6 takes place as to someone claiming sovereign immunity should  
7 be limited to the jurisdictional issue.

8 THE COURT: To that. Okay.

9 MR. SPECKS: Thank you, Your Honor.

10 THE COURT: All right.

11 MR. ATADAKA: Your Honor, I just, if you give me a  
12 little chance, Your Honor?

13 MR. BLANCH: Your Honor?

14 THE COURT: You're looking for a response, too? A  
15 very brief one.

16 MR. BLANCH: Very briefly.

17 THE COURT: Very briefly. I'll take the responses,  
18 rebuttals, in the order in which people argued.

19 So, Mr. Blanch? Mr. Pri ver, you were second.

20 MR. PRI VER: I was second.

21 THE COURT: Yes, go ahead.

22 ARGUMENT VI -B

23 BY MR. PRI VER:

24 MR. PRI VER: The fact that Thai Ai rways engages in  
25 commercial activity in the United States and executed a waiver

1 does not establish the applicability of the commercial  
 2 activity exception.

3 The case law is clear and the recent decision by the  
 4 Second Circuit in Kensington International which is reported  
 5 at 505 F.3d 147, specifically at page 155, discusses the case  
 6 law that's been extent in the Circuit, including Re: Society  
 7 International, that you have to look at the gravamen of the  
 8 complaint when trying to determine whether the action is based  
 9 upon the commercial activity.

10 If the complaint is not based upon the commercial  
 11 activity, then the commercial activity exception does not  
 12 apply. And you look at the gravamen of the complaint, which  
 13 is, in this case, the alleged conspiracy.

14 THE COURT: Well, it's price fixing.

15 MR. PRI VER: It's for price fixing.

16 THE COURT: It's the application or the charging of  
 17 a fixed price as to air transportation.

18 MR. PRI VER: But the price is the effect. The fact  
 19 that there's a price charged in the United States for air  
 20 cargo transportation is not alone sufficient to get over the  
 21 commercial activity exception.

22 There has to be a connection based upon causal  
 23 connection between the alleged gravamen and the harm,  
 24 essentially. And so, that's what we're saying is deficient in  
 25 this case. And it's not just a pleading issue. If you,

1 again, Philatech and a legion of other cases, talks  
2 extensively about the evidence that's submitted in support of  
3 the motion.

4 THE COURT: Wait. I really need to understand what  
5 you're saying because I'm not. It's escaping me.

6 A fixed, an artificially fixed price by definition  
7 causes harm; does it not?

8 An artificially fixed price, because of a conspiracy  
9 to fix the price, that's a given. It's a harm.

10 MR. PRI VER: And I would agree with that.

11 THE COURT: Okay. So, what distinction are you  
12 trying to draw?

13 MR. PRI VER: They have to make a showing. Their  
14 say-so in their complaint based on a conclusion that there was  
15 this agreement between 39 carriers to set prices globally does  
16 not have a tendency in law or fact to prove, number one, that  
17 Thai Airways was a part of that conspiracy.

18 THE COURT: But you're saying they need to have more  
19 specific, a more specific showing of your client's actual  
20 participation in a price fixing conspiracy --

21 MR. PRI VER: Correct.

22 THE COURT: -- that resulted in an artificial price  
23 being charged --

24 MR. PRI VER: In the U.S.

25 THE COURT: -- on a contract of carriage touching

1 the United States.

2 MR. PRI VER: Yes.

3 THE COURT: Okay.

4 MR. PRI VER: And just on the pleading issue, again,  
5 and this is in the brief Jin versus --

6 THE COURT: Counsel you need to go a little slower  
7 for our court reporter's sake. It's been a long day for her,  
8 too.

9 MR. PRI VER: Jin versus Ministry of State State  
10 Security 475 F. Sub. 2d, at page 60, the Court again makes  
11 clear that "because subject matter jurisdiction focuses on the  
12 court's power to hear the case, the Court must give the  
13 plaintiffs factual allegations closer scrutiny when involving  
14 a 12(b)(1) motion than would be required for a 12(b)(6) motion  
15 for failure to state a claim".

16 So, the idea that conclusory allegations of this  
17 complaint satisfy that, I think, is sheer fantasy.

18 And on the discovery issue, and this is cited in a  
19 footnote, the Stutts against De Dietrich Group, 465 Fed. Sup.  
20 2d. 156/169, Eastern District of New York. "District courts  
21 in this circuit routinely reject requests for jurisdictional  
22 discovery where a plaintiff's allegations are insufficient to  
23 make out a prima facie case of jurisdiction".

24 The whole point of this, Your Honor, is to keep the  
25 foreign sovereign from having to assume and engage in the

1 burdens of litigation if the plaintiffs in the first instance  
 2 can't make a necessary showing in their pleading.

3 Not only have the plaintiffs failed do that in their  
 4 pleading, which is why they never asked for and probably never  
 5 got any jurisdictional discovery, but here we are on this  
 6 motion asking the Court to let us out of this case because we  
 7 don't really belong here. They've had their opportunity to  
 8 present the evidence and all they've shown this court is  
 9 matters that --

10 THE COURT: They make the argument that 12(b)(1)  
 11 motions, in 12(b)(1) motions the Court can look outside the  
 12 pleadings, in essence, and look to an appendix and look to  
 13 their brief.

14 And is it your argument that the Court can't do that  
 15 in an FSI A?

16 MR. PRI VER: No, absolutely not. The court can.

17 But I don't recall and again, I don't have a  
 18 photographic recollection of the record, but the only thing  
 19 that I recall the plaintiffs have ever set forth is that we do  
 20 business in the United States.

21 THE COURT: Okay. I understand. But the appendix,  
 22 the Court is permitted to look to the appendix.

23 MR. PRI VER: Absolutely. And they have an  
 24 obligation to produce evidence that shows that we were part of  
 25 a conspiracy and that that resulted in super-competitive

1 prices for the cargo shipments that were shipped from the  
2 United States in Bangkok.

3 THE COURT: Okay.

4 MR. PRIVER: Okay?

5 Thank you, Your Honor.

6 THE COURT: Mr. Atadi ka, you wanted to say a few  
7 words?

8 MR. ATADI KA: Yes, Your Honor.

9 THE COURT: Mr. Blanch does, too.

10 But folks, just a couple minutes. I think I  
11 understood the arguments.

12 Mr. Blanch, you were first. So, go ahead.

13 ARGUMENT VI -B

14 BY MR. BLANCH:

15 MR. BLANCH: Less than one minute, Your Honor.

16 There are two things counsel said on rebuttal which  
17 I view as incorrect.

18 The claimant is shocked that we're coming here  
19 asking to assert FSIA in light of the waiver. Waivers are  
20 narrowly construed. A narrow construction of a waiver does  
21 not mean you waive everything under the sun.

22 THE COURT: Okay.

23 MR. BLANCH: The second point is that the waiver,  
24 even if the Court were to find that the waiver were effective  
25 and applied to this case, to essentially co-extend it with the

1 commercial activity exception, that's got to be based upon  
 2 commercial activity giving rise to the claim, that means that  
 3 it would effectively have the same effect as the commercial  
 4 activity exception.

5 If the Court were to find there were a commercial  
 6 activity exception in any case, that does not operate to  
 7 subject a foreign sovereign to a jury trial.

8 THE COURT: Understood. And they concede that. I  
 9 think, they concede that.

10 MR. BLANCH: I believe plaintiffs' counsel is saying  
 11 that in light of the waiver, they can be hauled into a jury  
 12 trial.

13 THE COURT: No, they don't concede. That's not the  
 14 argument. I didn't understand that to be the argument.

15 MR. SPECKS: I did not say that.

16 THE COURT: I think the FSIA, and you know I don't  
 17 have the statute clearly in mind, I think the FSIA designates  
 18 what the circumstances are in which the Court can acquire  
 19 jurisdiction to decide subject matter jurisdiction, and it  
 20 also says that in such cases the foreign sovereign retains the  
 21 right not to have a jury determine the case.

22 I think that's what the FSIA says.

23 MR. BLANCH: So, either way it's conceded that no  
 24 foreign sovereign in any event would ever be subjected to a  
 25 jury trial.

1                   THE COURT: As long as their foreign sovereigns. I  
 2 think that's right.

3                   Okay. Mr. Atadi ka?

4 ARGUMENT VI -B

5 BY MR. ATADI KA:

6                   MR. ATADI KA: Your Honor, Michael Atadi ka for  
 7 Ethiopian Airlines. Again Your Honor, just two points.

8                   Point number one, the fact that you have the  
 9 appendix to look at and the complaint cannot cure what is  
 10 fatal in this case. To take an FSIA defendant to court you  
 11 need to go through the language of the Act and you've got to  
 12 really pin the facts of the case on the defendant.

13                   Just telling you, Your Honor, that you can look at  
 14 the appendix and then putting one or two paragraphs cannot --  
 15 it's a very serious law emphasized, only exclusively reserved  
 16 for sovereigns, and for very good reason. So, I am submitting  
 17 most respectfully that the plaintiffs have not shown anything  
 18 for you to change that policy.

19                   THE COURT: Understand that the fact that I, that I  
 20 have to look at the appendix does not mean that I'm suggesting  
 21 that the appendix is sufficient.

22                   I'm permitted to look at the appendix, but I think  
 23 all parties agree I'm permitted to look at the appendix do see  
 24 if they supply enough of the evidentiary basis for want of a  
 25 better word to provide subject matter jurisdiction. And

1 that's the only issue.

2 I'm not suggesting that -- I don't believe I ever  
3 actually looked at the appendix and I'll confess that to  
4 everybody. So, but now I will.

5 MR. ATADI KA: And Your Honor, I'm submitting that  
6 even if you look at it, it cannot cure the defects of the  
7 pleadings on the -- as far as the FSIA defendants.

8 THE COURT: Okay. So, you're saying everything has  
9 to rise and fall on the pleadings; I am not permitted to look  
10 at the appendix.

11 MR. ATADI KA: No, no, Your honor. I did not say  
12 that.

13 THE COURT: Okay. What are you saying?

14 MR. ATADI KA: FSIA is a unique jurisdiction. It's a  
15 unique regime. And for you to take a foreign sovereign to  
16 court, you've got to plead it. And they have not shown  
17 anything in any of these complaints that enough of an -- that  
18 Ethiopian Airlines is an FSIA defendant. It's not there.

19 THE COURT: Okay.

20 MR. ATADI KA: Your Honor, the other point I would  
21 like to highlight is the question of the waiver.

22 Now, we have submitted that a waiver, the waiver  
23 clause comes from the permission that is given to an airline.  
24 And that language, Your Honor, is in the Warsaw Convention.  
25 So, we are submitting that if, in fact, the waiver language

1 which comes from that document, then Warsaw Convention should  
 2 apply to this matter.

3 Now, the Warsaw Convention also has exclusive  
 4 jurisdiction in the sense that you can only apply for remedies  
 5 that are specifically allowed by the Warsaw Convention. So,  
 6 if they are now relying on the language of the relation, which  
 7 is in fact in international air transportation, we submit most  
 8 respectfully, Your Honor, that the Warsaw Convention will  
 9 apply. If it is so, they have not pled that in any of the  
 10 pleadings to support that allegation that we have waived. And  
 11 then they go into the -- I don't know whether, Your Honor, you  
 12 got my submission on that.

13 They have resorted to the waiver language in a  
 14 document which is furnished to the airlines allowing them to  
 15 be, to do business in the United States. However, that  
 16 document is part of the Warsaw Convention language. So, if  
 17 they are now trying to rely on that waiver, most respectfully  
 18 then, they are subjecting themselves to the regime of the  
 19 Warsaw Convention. And the remedies there do not allow for  
 20 antitrust claims.

21 So, that's our position.

22 THE COURT: Okay.

23 MR. ATADI KA: That they cannot.

24 THE COURT: I understand.

25 Mr. Cross?

1 MR. CROSS: Yes. I will take less than one minute.

2 ARGUMENT VI -B

3 BY MR. CROSS:

4 I encourage you to look at the appendix. All of the  
5 appendix; ours, theirs, everyone's.

6 THE COURT: Okay. I will be doing that.

7 MR. CROSS: Secondly, Mr. Specks did say one thing  
8 that I think I need to correct.

9 He said the only thing we had done to act as an  
10 organ of the state of the Republic of South Africa was to  
11 report to the Department of Public enterprise.

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13 (Continued on following page.)

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Argument VI -A - Mr. Cross

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1 ARGUMENT VI -A

2 BY MR. CROSS

3 MR. CROSS: (Continuing) That is why I encourage you  
4 to read the other affidavit, too, which is attached to the  
5 motion papers. It makes it sound like we're reporting like  
6 school children reporting to the principal, the Department of  
7 Public Enterprise, which runs the airline.

8 THE COURT: I'm sorry.

9 MR. CROSS: The Department of Public Enterprise  
10 after June 2006 was running an airline and reported to by  
11 somebody that was functionally operating this airline.

12 THE COURT: You assumed operational control but had  
13 not yet owned it?

14 MR. CROSS: The shares were listed by the prior  
15 owner and were being listed by the government and the  
16 government changed the purposes of the airline to promote  
17 tourism, to promote the transportation hub and --

18 THE COURT: I think I remember that.

19 MR. CROSS: That's the point.

20 THE COURT: Mr. Specks, very quickly.

21 ARGUMENT VI -A

22 BY MR. SPECKS

23 MR. SPECKS: This operational control nonsense that  
24 he is giving you it's not in the affidavit that was submitted.

25 THE COURT: Fine, I'm going to look at the papers.

## Argument VI -A - Mr. Specks

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1 I assure you.

2 MR. SPECKS: With respect to this Warsaw Convention  
 3 nonsense, if you look and read the waiver.

4 THE COURT: If you would be useful without  
 5 characterizing just make the argument. Maybe you think it's  
 6 nonsense but I'm going to have to take -- I'm going to  
 7 consider it.

8 MR. SPECKS: It says the waiver is with respect to  
 9 those actions instituted and against it in another or tribunal  
 10 in the United States are, A, based on its operations in  
 11 international air transportation. That, according to the  
 12 contract of carriage include a point in the U.S. as a point of  
 13 origin/point of destination; or agreed stopping place; or for  
 14 which the contract of carriage with persons in the United  
 15 States then it says "Or," O-R;

16 B based on a claim under any international  
 17 agreement or treaties, that's the Warsaw Convention. So the  
 18 word "or" is disjunctive.

19 THE COURT: Understood. I understand the argument.

20 Let's go to the final issue and that's the Air  
 21 Mauritius. Actually, we have a statute of limitations issue.  
 22 I don't really need argument on it, I understand the issue and  
 23 I don't need argument. But Air Mauritius has a substantial  
 24 personal jurisdiction motion and so who is here for Air  
 25 Mauritius.

## 1 ARGUMENT VI -A

2 BY MR. DONOVAN

3 MR. DONOVAN: Richard Donovan, Kelly, Drye &amp; Warren.

4 I conferred with counsel at the break and given  
5 the late hour we've agreed to cut back to the bare minimum, it  
6 will just take a minute or two to make our points and to  
7 emphasize what are some of the things that have been raised  
8 and answer questions that Your Honor might have.9 THE COURT: Let me ask a question right off the bat.  
10 Do I have to have an evidentiary hearing on the various  
11 aspects of -- put aside for the moment this service that the  
12 notion that I examine service under New Jersey law. I am  
13 forgoing that frankly I'm not persuaded that I should look at  
14 New Jersey law at this point.15 I mean, if you'd served -- if the plaintiffs  
16 had served their action in New Jersey with a New Jersey  
17 district court, then and then transferred it here or had it  
18 transferred here then clearly that would be the right  
19 procedure but I'm not persuaded that I look to New Jersey law  
20 to that -- well, in any event -- neither side shouldn't burden  
21 themselves with argument on that.22 But, I think I am examining this under New York  
23 law. There is plenty of basis, it seems to me, or at least  
24 there's plenty of room for argument about whether there are  
25 sufficient indicia of doing business of transacting business

1 here out of which these claims arise such that I may have to  
 2 have evidentiary hearing so tell me about that.

3 MR. DONOVAN: Your Honor, there are a lot of  
 4 arguments, but I don't think you need an evidentiary hearing  
 5 because I don't think any of the facts would meet the  
 6 plaintiff's burden here.

7 The plaintiff's agree at Page 13 of their memo  
 8 that the standard at this point is that they must come forward  
 9 with because we have challenged jurisdiction and there has  
 10 been jurisdictional discovery. They can't rest on the  
 11 allegations of their complaint and they have done that in the  
 12 form of a submission of a number of documents which were  
 13 produced in discovery or they obtained from the Web.

14 And, what we're saying is that they've gone  
 15 ahead and submitted those facts but they do not prove what  
 16 they need to prove to meet either the minimum contacts the  
 17 various jurisdictional bases or at least, more importantly,  
 18 due process and to show that it would be reasonable for this  
 19 court to exercise jurisdiction over our client.

20 Our clients business is centered in Europe,  
 21 Asia, and Africa and perhaps it may be subject to jurisdiction  
 22 in one of those countries or continents and that's also where  
 23 the alleged conspiracy apparently took place. Plaintiffs  
 24 concede in their proof that it didn't happen here; it was  
 25 outside the United States.

1                   THE COURT: But don't you charge prices here for  
 2 transportation of goods out of the United States and to the  
 3 United States, too, for that matter; but you impose charges  
 4 here, you solicit business here in New York through the agent  
 5 who has the authority to bind your airline, and I understand  
 6 that your airline itself, I guess, doesn't fly here but you  
 7 have arrangements with other airlines to where they'll pick up  
 8 the goods here and then transfer it to you. But you're the  
 9 one that arranges for that all carriage through your agent. I  
 10 mean, why is it that doing business here?

11                   MR. DONOVAN: It's not, Your Honor.

12                   First of all, in terms of the agent you can put  
 13 that aside because the Second Circuit said in the Wiwa case,  
 14 quoting the New York Court of Appeals, that you don't look at  
 15 the agent's actions to satisfy, or I should say, impute the  
 16 actions to the foreign defendant unless it was an exclusive  
 17 arrangement which it was not. This agent represents the eight  
 18 other airlines and so in and is not sufficient.

19                   Secondly, the decision about what prices to  
 20 charge is made in Mauritius as set forth in the declarations  
 21 that we have submitted to the Court and there is nothing that  
 22 contradicts that.

23                   So, when you're talking this morning about,  
 24 well, okay, the decision to apply quote, unquote, "The fixed  
 25 price," whether it was surcharges or what have you a decision

1 is made in Mauritius and they set what the rates are. And  
 2 then the only thing the New York agent does is it takes an  
 3 order, somebody comes up and says, "I want to send something  
 4 to Mauritius." They take that order, they can't even  
 5 themselves confirm that, they can't enter into the contract.  
 6 They have to then go back and check with headquarters in  
 7 Mauritius to find out if space is available on a particular  
 8 flight and to confirm what the fee would be and those are key  
 9 distinctions for a jurisdictional argument, Your Honor.

10 THE COURT: Okay. There was a variety of other  
 11 things. You do solicit business and the argument is you have  
 12 to have solicitation plus something.

13 MR. DONOVAN: There are a couple of things with  
 14 that. We really don't solicit business very much. We have a  
 15 website, that's about it, and there is no other showing of  
 16 solicitation.

17 But, secondly, as in, in fact, there was a  
 18 recent opinion by Judge Glasser who pointed out in a case  
 19 called Sikorsky Aircraft which came out at the time that we  
 20 were filling our reply memo where he pointed out under the  
 21 cases in the Second Circuit, in order to have solicitation you  
 22 have to have five percent or more of the company's revenues to  
 23 constitute substantial solicitation; and we've shown in the  
 24 facts we submitted to Your Honor our revenues from sales that  
 25 connect in any way to New York are way less than that and

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1 that's --

2 THE COURT: But they're still in the hundreds of  
3 thousands of dollars?

4 MR. DONOVAN: Yes.

5 THE COURT: Where does Judge Glasser get the five  
6 percent from?

7 MR. DONOVAN: He cites a number of different cases  
8 from different district court decisions and looks at what the  
9 percentage was in each case.

10 THE COURT: Okay. So, it's -- okay. A survey of  
11 the cases, basically.

12 MR. DONOVAN: Essentially, yes, Your Honor. And,  
13 that ties into the reasonableness point: Why it would not be  
14 reasonable to exercise jurisdiction in this case even if Your  
15 Honor found that one of the jurisdictional bases was met which  
16 we do not believe they were.

17 But just quickly, just a few of the salient  
18 facts here. We were in the process of closing our New Jersey  
19 office when we were served with the complaint and I think you  
20 are allowed to take that into account in terms of the  
21 reasonableness issue and the burden on a foreign defendant if  
22 it's forced to come into this court and defend itself.

23 Secondly, there's no specific proof against our  
24 client which Your Honor has already observed here.

25 Paragraph 30 of the complaint is the only one and the

1 all allegations are similar to the one that you just read  
2 regarding one of the other foreign defendants. They're just  
3 very generic.

4 Another thing I want to point out to Your Honor  
5 is that we are not involved at all in the European  
6 investigation. Our client, to our knowledge, has not been  
7 named in that and we are not involved here so that is not  
8 dispute.

9 THE COURT: You are not naming that statement of  
10 objections?

11 MR. DONOVAN: Correct, Your Honor, I have not seen  
12 the statement but that is what I am told.

13 THE COURT: Who has seen it? Only plaintiffs I  
14 guess.

15 MR. ARENSON: The plaintiffs haven't seen it.

16 MR. TOMPKINS: The parties that are named there.

17 THE COURT: You wanted to see it.

18 MR. ARENSON: Yes, Your Honor.

19 MR. TOMPKINS: Yes.

20 THE COURT: In a big way.

21 MR. TOMPKINS: I am --

22 MR. ARENSON: They let us see it.

23 MR. WARNOT: They are obligated by European  
24 Commission Law to look.

25 THE COURT: Sorry for interrupting.

1                   MR. DONOVAN: You mentioned the connection with  
 2 other airlines. Your Honor understood that we do not, in  
 3 fact, land any planes in the U.S., our planes never come here.  
 4 We do have an interline agreement with other carriers so that  
 5 shipments can be made to or from but we criticized, Your  
 6 Honor, dozens of cases that say that's not enough to find  
 7 jurisdiction. Otherwise, every carrier or railroad would be  
 8 subject to jurisdiction anywhere that somebody connected to  
 9 their railroad or bought a connecting ticket.

10                  THE COURT: But no single thing is enough, I don't  
 11 mean to suggest that. But you don't take these things in  
 12 isolation. You look at all the factors.

13                  MR. DONOVAN: Agreed, Your Honor, and what we're  
 14 saying is we still have to have a jurisdictional basis and  
 15 overall, if you're looking at the reasonableness, you have to  
 16 look at everything. And, in particular, I would say under the  
 17 cases that we've cited, the minuscule percent of our sales  
 18 that have to do with the United States is a very key factor.  
 19 It's one of the cases noted. We would spend much more money  
 20 defending this complex litigation than we ever have received  
 21 in revenues from U.S. based commerce. And as you could tell  
 22 this is going to be a very expensive case to litigate  
 23 especially if Your Honor does not grant the motion to dismiss.

24                  The other thing is just the obvious one that  
 25 Mauritius is a small country on the other side of the world.

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1 I dare say that most of us didn't even know where it was  
 2 until --

3 THE COURT: I'm still not entirely sure. It's  
 4 somewhere in the Indian Ocean.

5 MR. DONOVAN: Yes, Your Honor, in the Indian Ocean  
 6 off the southwest coast of Africa.

7 THE COURT: Off of Madagascar.

8 MR. DONOVAN: It takes 30 hours to get there. You  
 9 have to change planes two or three times, and yes, these are  
 10 the days of modern air travel. But it's not just like hopping  
 11 a flight to London, this is really is on the other side of the  
 12 world and it's not easy to come back and forth.

13 In terms of reasonableness, the other factors  
 14 are where is the evidence located. Well, obviously, the  
 15 evidence with respect to us is located there which is not easy  
 16 to get to and from the sound of it, most of the evidence in  
 17 this case is going to be outside the United States, or  
 18 certainly much of it.

19 The other thing, Your Honor, that relates also  
 20 to reasonableness is that plaintiffs can obtain full relief in  
 21 this case from the other defendants. They don't need us here,  
 22 we don't add very much and that's a factor that the courts  
 23 have also considered.

24 THE COURT: Explain why that is.

25 MR. DONOVAN: Well, Your Honor, there are many or

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1 defendant with larger pockets than us if it's a conspiracy  
2 case.

3 THE COURT: Okay oh, I see joint and several  
4 liability.

5 MR. DONOVAN: Yes, Your Honor.

6 THE COURT: I got it.

7 MR. DONOVAN: Putting aside the fact that as I've  
8 said there is nothing whatsoever, not a single fact to connect  
9 us to this alleged conspiracy. I will stop there unless you  
10 have questions.

11 THE COURT: I think you've covered it. You did say  
12 that the Internet website is not an interactive website. You  
13 can't place orders on it? It's merely a -- it's a presence of  
14 some kind here, right? Or it's a presence wherever it can be  
15 viewed.

16 MR. DONOVAN: Yes, Your Honor.

17 Under the cases that deal with websites as a  
18 basis for jurisdiction, this is more in the nature of what we  
19 would a passive website where you can get information and you  
20 can submit a request that says you're interested in shipping  
21 something and get more information that way but you cannot  
22 place an order.

23 THE COURT: You get information about rates.

24 MR. DONOVAN: What happens is if you submit  
25 something and say, "I'm interested," you would then be

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1 contacted by the local agent who would try to answer your  
 2 questions, give you rates and availabilities, and what have  
 3 you.

4 THE COURT: Okay.

5 MR. DONOVAN: Thank you, Your Honor.

6 MR. ASCIOLLA: Greg Asciolla for the plaintiffs.

7 Good evening, Your Honor. I'm going to be very  
 8 brief. I guess I will start there must be I guess it's late  
 9 that I just want to quickly address New Jersey.

10 I'm disappointed that you don't think that's  
 11 sufficiently a strong argument, but I would urge you to look  
 12 at Judge Scheindlin's opinion in In Re: Ski Train Fire where  
 13 she did an extensive analysis on why it's proper when a  
 14 defendant is named as a transferee in an MDL proceeding to  
 15 look at the transferor.

16 THE COURT: There was no transferor; it was never  
 17 transferred. It is the potential transferor because you could  
 18 have sued them, but you didn't so this was never transferred.

19 MR. ASCIOLLA: We couldn't sue them there.

20 THE COURT: Why couldn't you? We're still getting  
 21 claim -- cases filed here that are then added. There is  
 22 nothing that prohibits somebody from filing a case somewhere  
 23 else.

24 MR. ASCIOLLA: Actually, Your Honor, if you look at  
 25 her case and the cases that she cites the proper place to name

1 new defendants in MDL proceedings is the transferee court.

2 THE COURT: Where is that stated?

3 MR. ASCIOLLA: In Re: Ski Train Fire.

4 THE COURT: Where in the case? Where is the rule  
 5 that says that? That's Judge Scheindlin's statement, I don't  
 6 even know I will look at the case but I'm not persuaded  
 7 frankly by just a judicial pronouncement that the Court  
 8 ignores the rules of civil procedure or even the MDL that case  
 9 this court has the jurisdiction over the transferor court  
 10 that's it but there is no transferor court.

11 So, why do I look -- does that mean that once  
 12 the case is consolidated in court that the Court can use any  
 13 state court jurisdiction anywhere to establish jurisdiction  
 14 here.

15 MR. ASCIOLLA: It would mean that you would look to  
 16 every jurisdiction where a transferor court is to find  
 17 jurisdiction.

18 THE COURT: You mean a transferor court could be?

19 MR. ASCIOLLA: No, let's take this case for instance  
 20 it would be the nine transferor courts that made up the  
 21 80 cases that are before you.

22 THE COURT: Okay.

23 MR. ASCIOLLA: So you could look back at any one of  
 24 those nine.

25 THE COURT: Any one of those nine and the District

1 of New Jersey was one of them.

2 MR. ASCIOLLA: And we have chose New Jersey because  
 3 Air Mauritius concedes there was personal jurisdiction they  
 4 don't concede due process satisfied they conceded that and we  
 5 picked New York for its obvious contacts with respect to, in  
 6 particular, the acts of its agent there not because the MDL  
 7 moved the cases here but that there's jurisdiction over Air  
 8 Mauritius here.

9 THE COURT: Okay.

10 MR. ASCIOLLA: If you think of it another way, if we  
 11 are -- well, if it's proper to be serving, I'm sorry, naming a  
 12 defendant here in this case, I don't think it would be fair to  
 13 plaintiffs to have to be stuck only naming defendants that  
 14 happen to do business in New York. Suppose --

15 THE COURT: No, of course, not but you could file  
 16 acquire jurisdiction where you can acquire jurisdiction and  
 17 then have the case transferred just like it happens all the  
 18 time in MDL cases.

19 Cases are filed around the country and even  
 20 after the case has been consolidated somewhere new cases get  
 21 filed and they get transferred in and that's the proper  
 22 procedure it seems to me. I don't see why that shouldn't have  
 23 been followed here.

24 I mean, you know, well any way --

25 MR. ASCIOLLA: Okay. Looking at Section 301 for

1 here in New York, I think it's a classic case of looking at  
 2 the agent's contacts here and finding that Air Mauritius is  
 3 doing business in New York and if you look at what this agent  
 4 was doing here on behalf of Air Mauritius in New York to have  
 5 an agency agreement where they were expressly authorized to  
 6 make cargo sales over the services of Air Mauritius and they  
 7 had a number of other services that they were providing on  
 8 behalf of Air Mauritius here soliciting, promoting, and  
 9 selling air cargo transportation employing staff --

10 THE COURT: But they say they weren't soliciting and  
 11 that's why I was getting to the point of whether I need to  
 12 have an evidentiary hearing on this.

13 I mean, if the agent was solicited, and then  
 14 there's a question about whether they're exclusive or not or  
 15 how exclusive they were. There is no question that Avia was  
 16 representing other airlines and you're saying that exclusivity  
 17 is not dispositive.

18 MR. ASCIOLLA: It is not dispositive, it is a  
 19 factor.

20 THE COURT: It would be helpful.

21 MR. ASCIOLLA: One of many factors.

22 THE COURT: Are there disputed factual issues about  
 23 how Avia is -- is it Avia or Avia how you this conducted their  
 24 business that I need to hold an evidentiary hearing.

25 MR. ASCIOLLA: I don't think there is any question

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1 or dispute as to what Avia is doing.

2 THE COURT: Okay.

3 MR. ASCIOLLA: I think if you just look at all the  
 4 things in their agency agreement I don't think there is any  
 5 dispute that they are sell the services of Air Mauritius and  
 6 deriving standing revenues for Air Mauritius here in New York.

7 And I think if you look across the spectrum of  
 8 cases for §301 underpinning them all is that the agent is here  
 9 doing the business that Air Mauritius or the principal would  
 10 otherwise be doing if it weren't for the agent being here.  
 11 And here Air Mauritius was here, well, it was in New Jersey.  
 12 It was here doing the business of Air Mauritius of selling air  
 13 cargo services and when it left and Avia took that role. It's  
 14 doing the exact same -- I'm sorry -- it's providing the same  
 15 exact same service that is Air Mauritius did. Basically, Avia  
 16 stepped in Air Mauritius' s shoes.

17 As far as the revenues, they're substantial.  
 18 They average almost a million dollars a year and if you look  
 19 up the Nippon case that was about \$600,000, that was an  
 20 Eastern District of New York case that satisfactory the  
 21 solicitation plus. I think another important factors.

22 THE COURT: What is it it's the volume of sales.

23 MR. ASCIOLLA: Right. Right.

24 THE COURT: Putting aside the percentage of their  
 25 overall revenue.

1                   MR. ASCIOLLA: Courts to look at both they look  
 2 percentage with much more skepticism because you are making so  
 3 much money that percent an could be very, very tiny and yet a  
 4 large number in the United States. I think another important  
 5 factor with respect to Air Mauritius's relationship with the  
 6 agent is that they have I just want to get the wording right,  
 7 a very large degree of control over them and, again, it shows  
 8 that this really is in essence Air Mauritius here.

9                   I think if you look at the contacts of Avia,  
 10 you can easily say that this is a classic case where an agent,  
 11 where you couldn't look at an agent's contacts and find  
 12 jurisdiction over the principal and I would urge the court to  
 13 look at the McLaughlin case which is strikingly similar to  
 14 this case. In that case the agency agreement looked almost  
 15 identical.

16                   THE COURT: Is that a New York.

17                   MR. ASCIOLLA: Eastern District of New York case  
 18 1985 found at 602 F. Supp. 29 and the Court found that,  
 19 "Without question a foreign company was unduly sited doing its  
 20 business in New York with its agent under §301."

21                   If I can touch upon the reasonableness factor  
 22 with respect to the due process argument.

23                   THE COURT: Yes.

24                   MR. ASCIOLLA: I think it would be a minimal burden  
 25 for Air Mauritius to be part of this litigation because

1      wi tnesses are here no New York, wi tnesses possi bl y are here i n  
 2      New Jersey, and when l i tigation started Ai r Mauri ti us put i n to  
 3      storage all of thei r documents from thei r business for the  
 4      many years they were i n New Jersey i n to storage i n New Jersey.  
 5      So, there's going to be a very mi nimal burden as far as some  
 6      of the wi tnesses potential wi tnesses and certai nly some of the  
 7      occupants.

8                Also, I understand i t's a tiny i sland but Ai r  
 9      Mauri ti us i s an i nternati onal sophi sticated ai rline. If  
 10     anybody has a lesser burden to travel i t woul d be people  
 11     i nvol ved wi th i nvol ved wi th ai rline i t might be funny, but we  
 12     have, we submi tted documents i tineraries of when vari ous  
 13     business people from Mauri ti us from Ai r Mauri ti us traveled to  
 14     the Uni ted States when they were looking for a potential agent  
 15     to replace Ai r Mauri ti us and sell thei r cargo services here i n  
 16     the Uni ted States.

17               So, I think i t's very, very strong argument  
 18     under §301 and Ai r Mauri ti us's contacts through i ts agent.

19               THE COURT: Okay. All right. Thank you very much.  
 20     I think -- are there any loose ends I still need to hear from  
 21     people on?

22               MR. DONOVAN: Can I have 30 seconds? I'm sorry, I  
 23     know.

24               THE COURT: Okay.

## 1 ARGUMENT VI -A

2 BY MR. DONOVAN

3 MR. DONOVAN: I just need to correct the record on a  
4 couple of things.5 First of all, in terms of the evidence it's not  
6 true that all our documents are in New Jersey. The documents  
7 that are in New Jersey really are just those that relate to  
8 the operations in the New Jersey office but the vast majority  
9 of our documents are in Mauritius.10 Likewise, the witnesses that will know anything  
11 about our involvement with other defendants and participation  
12 in any conspiracy are in Mauritius, they're not in New Jersey.  
13 There is nobody left in New Jersey at this point.14 And, on the control point, I would just refer  
15 Your Honor to the Miller case from the New York Court of  
16 Appeals I think this case is much more like that one than the  
17 cases that counsel cited.18 There was not a large degree of control by us  
19 over the business of Avia cargo we only had control over their  
20 dealings represent us which is a crucial distinction in terms  
21 of jurisdiction. It's not like the case where went the way  
22 after parent sub but there is an issue about the did the  
23 parent control the sub in the construction that is not what  
24 happened here again as I think I said.

25 THE COURT: The distinction you're making is that

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1 while you had control over what they did on behalf of you, you  
2 didn't have control over what they did the rest of the time.

3 MR. DONOVAN: Correct, we didn't run their airways.

4 THE COURT: You didn't run their operation?

5 MR. DONOVAN: Right.

6 THE COURT: In fact, part of your argument is that  
7 you had such substantial control that they were very limited  
8 in what they could do.

9 MR. DONOVAN: Correct.

10 THE COURT: Everything had to be cleared through you  
11 and Air Mauritius.

12 MR. DONOVAN: My last point is they could not bind  
13 us we made our own decisions in Mauritius about whether to  
14 accept particular proposals.

15 Thank you, Your Honor.

16 THE COURT: Thank you very much.

17 I do want to just make the point that the  
18 advocacy has really been remarkable both on the papers and in  
19 the arguments today I really appreciate it. It's been a  
20 pleasure to hear so many good litigators advocate their  
21 positions. So thank you.

22 MR. ARENSEN: Thank you, Your Honor, thank you for  
23 were you patience.

24 (WHEREUPON, the proceedings were adjourned. )

25 \* \* \*

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